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No. _____

In The

Supreme Court of the United States

CHERYL JANKY,

Petitioner,

v.

LAKE COUNTY CONVENTION AND VISITORS BUREAU,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court erroneously considered Farag's intent and copyrightability of the offered ideas from Farag to form a joint song authorship pursuant to *Erickson v. Theatre*, 13 F.3d 106, 1071 (7th Cir. 1994) when the alleged proposed author disavowed being the joint author by his counterclaim and bankruptcy petition filed and the Court of Appeals ruled that the disavowed party is a joint author contrary to the Copyright Act 17 U.S.C. § 204 and Erickson.

II. Whether the Court of Appeals abused its discretion and exceeded its jurisdiction beyond the Copyright Act of Joint Authorship by granting Respondent relief that was not requested on behalf of a disavowed party who confirmed he was not the author to Petitioner's song by his counterclaim and bankruptcy petition.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual. There is no parent or publicly-held company owning 10% or more of Petitioner's interest.

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Cheryl Janky respectfully petitions for a writ of certiorari to review the split decision of the U.S. Court of Appeals for the Seventh Circuit reversing the lower court decision, Appendix ("App") 1a-17a.

OPINIONS BELOW

The split decision of the court of appeals is reported at 544 F.3d 164 and is reproduced in the Appendix herein at 1- 17a. The decision of the U.S. District Court for the Northern District of Indiana Hammond Division.

JURISDICTION

The judgment of the court of appeals was issued on August 3, 2009. [App. pg. 1a-17a] Petitioner's timely petition for rehearing and rehearing en banc was denied on October 2, 2009. [App. pg. 74a] This Court's jurisdiction is pursuant to 12 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This compelling case concerns the continuing vitality of this Court's decisions in the majority circuits, Copyright Act statutes and case law. The majority circuit decisions and the Copyright Act define a joint work prepared by two or more authors with the intention that their contribution be merged into separable or independent parts of a unitary whole.

Petitioner, Cheryl Janky, ("Janky") respectfully petitions for Writ of Certiorari to review the Court of Appeals' split decision that has so far departed from the accepted and usual course of judicial decisions reversed a jury decision and district court summary

judgment order for Petitioner Janky. The Court of Appeals' decision does not conform to the law of the Seventh Circuit and majority circuits. Henry Farag was awarded joint ownership of Petitioner's song and he did not appeal. [App. pg. 1a] Farag disavowed being a joint author, confirmed by his counterclaim [App. pgs. 15a and 54a] against Janky, court testimony, pleadings and declaration, nor was there any intent in the court record by Farag to be a co-author, but the court "thinks" he should be. [App. pg. 10a] The district court's decision that Farag is not the joint author [App. pg. 8a, 54a-63a] is correct. Farag also filed bankruptcy in the Seventh Circuit [App. pgs. 7a, 41a and 42a] and reaffirmed the disavowed interest in the song and did not list Petitioner's song as one of his assets. In Farag's deposition, he admitted he was in a partnership with Respondent.

Petition for Certiorari is sought in this case because the panel's split decision in favor of Respondent, lacking standing or jurisdiction to appeal [App. pg. 3] to argue for Farag who disavowed contributing to the song [App. pgs. 15a, 41a, 42a and 54a-63a], goes against majority circuits and the precedent, *Erickson v. Trinity Theatre, Inc.* 13 F.3d 1061, 1071 (7th Cir. 1994). The Court of Appeals' split decision conflicts with the majority circuits, destroys uniformity among the circuits and is contrary and ignores the Copyright Act, under joint authorship, intent and transfers Petitioner's copyright interest without a written instrument, 17 U.S.C. § 204. The Court of Appeals' decision is also contrary to its own circuit and must be reversed to not cause greater harm to writers and creative persons throughout the United States. The Court of Appeals decision also lacks the requisite two

keys to be a joint author, intent and copyrightability. [App. pgs. 16a and 42a-63a]

STATEMENT BACKGROUND

Petitioner Cheryl Janky and Henry Farag were members of Stormy Weather, a musical group. At rehearsal one evening, Mr. Farag made an announcement that Respondent Lake County Convention & Visitors Bureau ("LCCVB") was looking for a song to represent LCCVB. No formal rules or parameters for the contents of the song were provided to the group. [App. pg. 4] Petitioner Janky was the only songwriter in the Stormy Weather group. Petitioner learned later at trial that the contest was a sham created by Farag and Respondent's CEO, Speros Batistatos, to get Janky to write the song. As a result of that announcement, Ms. Janky wrote the music and lyrics of the song "Wonders of Indiana" a/k/a "Indiana," and on May 6, 1999, [App. pg. 5a] without the assistance of counsel, Ms. Janky obtained a copyright for the musical work entitled "Wonders of Indiana," (Pau2-397-856), indicating that she was the sole author. [App. pgs. 5a and 58a]

Subsequently, unbeknown and without any authorization by Petitioner Janky, Respondent LCCVB's CEO, Speros Batistatos, talked to Farag. Respondent's CEO, Batistatos, made suggestions about Petitioner Janky's song and conveyed his ideas to Henry Farag. Farag offered Speros Batistatos' suggestions to Janky. [App. pg. 5a] Farag did not disclose that Batistatos made the suggested changes to her song. (Petitioner's Appeal Brief, pgs. 20 and 21) [Docket Entry 345, pgs. 14-17] This became known at trial when Batistatos took the witness stand and cited

it was he that made the changes. Petitioner Janky incorporated Speros Batistatos' ideas, not knowing that they were Batistatos'. (Pet. Appeal Brief, pgs. 20 and 21) Janky prepared a new copyright registration form (Pau 2-485-026 for the revised song "Indiana (Wonders of)" and signed Farag's and her names on the form believing she was giving Farag credit as a "thank you" for Farag's suggestions. [App. pgs. 5a and 58a] The copyright registration indicated Petitioner Janky gave herself credit for writing music and lyrics and mistakenly Mr. Farag credit for lyrics. [App. pgs. 5a, 7a, 8a and 58a]

In a November 9, 2005 Declaration, Ms. Janky, Petitioner, stated it was her intent to include Mr. Farag on the December 16, 1999 copyright registration for the revised song was to indicate her gratitude, [App. pgs. 5a, 15a and 58a] to designate credit for the suggested ideas (not knowing it was Batistatos), and to demonstrate that she "appreciated every little bit of support, which is hard to obtain in this [entertainment] industry." [App. pg. 5a] She explains, "I now understand that the proper way to give a 'thank you' for any de minimis contribution is to give acknowledgment on the album credits and/or liner notes." [App. pg. 5a] *Id.* Ms. Janky further states, "I never intended for Mr. Farag to acquire any copyright ownership interest in the song 'Wonders of Indiana a/k/a 'Indiana' and I did not consider him to be a co-author of the song. [App. pgs. 5a, 58a, 59a, 61a, 62a and 63a] Mr. Farag was not present when I originally created the song in early 1999. I created the music for the song 100% on my own. Mr. Farag's contributions to the song were zero [App. pgs. 5a and 57a] (Petitioner's Appeal Brief pgs. 20 and 21) or none, and he admitted this in his counterclaim. [App. pgs. 15a,

41a, 42a and 59a] Mr. Farag sued Ms. Janky for forgery in putting his name on the copyright application [App. pgs. 15a and 57a] and stated it was a forged document that harmed his reputation. [App. pg. 59a] Janky represents that Mr. Farag and she never discussed his intent or desire to share ownership of the song. [App. pgs. 7a, 16a, 57a and 57a-61a]

The district court in its findings found Mr. Farag never requested for the Petitioner, Janky, to include his name on the copyright registration form [App. pgs. 5a, 7a, 8a and 57a] and brought claims against Janky in a counterclaim [App. pg. 15a] for one million dollars because her act of affixing his name on the copyright application was a forgery and has harmed his reputation. [App. pg. 55a] Mr. Farag has never filed a copyright registration of his own asserting his contribution to the lyrical composition of the revised song. Farag also filed a U.S. bankruptcy petition [App. pg. 7a] that the lower court Judge Cherry took notice of, Chapter 7, Case No. 05-6060600. Farag disavowed any interest in the song in his bankruptcy petition [App. pgs. 7a, 49a and 50a], repudiated his interest in the copyright and listed his counterclaim as a one million dollar asset against Janky, not the song. [App. pgs. 15a, 41a, 42a and 59a]

All pleadings filed by LCCVB, Respondent and counsel were materially false that Farag contributed to Janky's song [App. pgs. 15a and 41a-59a] and compounded their acts throughout the proceedings knowingly and intentionally to deceive the lower court process and the Court of Appeals. Respondent did not have standing to falsely assert and advocate the position that Farag is a joint author. [App. pgs. 3a, 15a and 55a] Respondent's counsel filed repeated pleadings

contrary to the law and facts and the lower court's findings. [App. pgs. 15a and 41a-63a] Respondent's CEO, Speros Batistatos, stated at trial he was the sole contributor to Petitioner Janky's song and he made suggestions and offered his ideas to Janky through Farag who admitted in his deposition he was Respondent's partner. (Pet. Appeal Brief, pg. 20) LCCVB and their counsel materially misrepresented law, facts and misstatements and falsified pleadings to mislead the appeals panel causing them to misapply the law and failure to observe the lower court record. (Appeal Brief pg. 20) [App. pgs. 5a, 7a, 8a, 15a, 16a and 41a-60a] As a result, the acts of Respondent's counsel's inappropriated conduct to fraudulently assert [App. pgs. 3a, 5a, 15a and 16a] Farag as a co-writer, the Court of Appeals issued a reversal of the lower court judgment. The Court of Appeals issued a split decision ruling contrary to the court's record, law and the circuits, causing harm among writers, creative persons throughout all of the circuits in regards to joint authorship between two or more parties. [App. pgs. 8a, 15a, 16a and 41a-61a]

Respondent, LCCVB played a shell game with Petitioner Janky to get an interest in Janky's song and paid Farag money for his services, using "work for hire and joint author" theories to deceive the lower court and the Court of Appeals through its shell game maneuvers. [App. pgs. 8a-12a, 15a, 16a and 41a-63a] The lower court under Judge Cherry detected Respondent's scheme and was not deceived by Respondent's conduct and scheme. [App. pgs. 8a, 49a and 41a-63a] Judge Cherry issued a summary judgment in favor of Petitioner, Janky, based on the pleadings, facts and bankruptcy petition [App. pgs. 7a, 8a and 53a-63a] of Farag along with his disavowed

interest not to be the copyright joint author. [App. pgs. 15a and 16a] There was no intent [App. pgs. 53a-63a] between the parties, nor were the minor ideas or suggestions copyrightable under the Copyright Act. [App. pgs. 9, 10a, 11a, 15a, 16a and 63a]

Respondent filed papers asserting its positions, exercising a false position as if Farag had standing rights. [App. pgs. 3a, 15a, 16a and 53a-63a] Respondent used Farag as a straw man. Farag did not appeal. [App. pg. 1a] Respondent and counsel circumvented Federal Rules 11, 26 and 37 to secure a judgment to be reversed by not disclosing Batistatos' acts of offering ideas for the changes to the song. [App. pg. 5a] and (Pet. Appeal Brief, pgs. 20, 21 and 23)

Petitioner filed suit against LCCVB for copyright infringement on October 3, 2003, and Respondent knew that Farag was not a contributor to the song. [App. pgs. 5a, 15a, 16a and 53a-63a] Farag was a mere runner liaison between Petitioner, Janky, and Respondent CEO Batistatos of LCCVB and was paid for conveying of the ideas from Speros Batistatos, CEO, as to what the song should sound like for it to be accepted by Respondent CEO Batistatos as prearranged. [App. pg. 5a] (Pet. Appeal Brief pgs. 20, 21 and 22]

LCCVB materially misrepresented the truth by falsely asserting false claims as "work for hire and joint authors" in court and its pleadings [App. pgs. 5a-12a, 15a, 16a and 57a-63a] *to deprive Janky of her ownership by any means and did not pay her after selecting her song and also to get Petitioner's judgment reversed by the Court of Appeals*. Respondent and its counsel suppressed the truth and filed false pleadings,

overlooking counterclaim, bankruptcy petition and testimony at trial of its CEO, declaring he alone made the changes to represent Farag as the joint author. [App. pgs. 5a, 7a, 8a, 15a, 16a and 53a-63a] and (Pet. Appeal Brief pgs. 20 and 21) Respondent's CEO was an unknown offeror of ideas for Petitioner's consideration. [App. pg. 5a]

Respondent's counsel, through its own admission, perpetrated a fraud on the court by materially representing that Farag is the source of the revised lyrics, [App. pgs. 5a, 7a, bankruptcy petition further confirmed, testimony at trial, 15a, 16a and 54a-63a] ***knowing this was a false concocted scheme and plan to defraud Janky out of at least 50% or 100% of her song if the work for hire theory was unsuccessful without a written sales or license agreement and her lower court judgment of $100,000 that the jury awarded.*** [App. pg. 8a] ***Respondent was able to secure a split court's decision by asserting a false claim it contrived using Farag who did not appeal.*** [App. pgs. 1a, 15a] ***Farag's claims were also judicially barred as to any joint authorship after a three (3) year statute limitation, 17 U.S.C. § 507(b). Respondent deprived Petitioner, Janky, of complete usage of her song by materially misstating Farag as a joint author.*** [App. pgs. 9a and 53a-63a] Respondent did all the aforementioned acts to control the usage of Petitioner's song using Farag as a straw man to get Janky's song. [App. pgs. 9a and 54a-63a] This was a travesty against the Copyright Act, case laws and all the circuits. [App. pgs. 9a, 15a, 16a and 54a-63a]

The Court of Appeals erred in reversing the district court judgment based on Respondent's counsel's acts without clean hands that were deliberate.

Respondent's acts unraveled with clarity when its CEO, Speros Batistatos, took the witness stand in the district court and declared under oath he alone made the suggestions and offered ideas to the song [App. pg. 5a] (Pet. Appeal Brief pgs. 20 and 21) cited at trial. Farag confirmed under oath in his deposition and at trial he did not contribute anything to the song and reconfirmed this by his counterclaim as cited in Petitioner's Appeal Brief, pgs. 20, 21. [App. pgs. 5a, 7a, 15a and 16a] The Court of Appeals erred based on the lower court record and Petitioner's Appeal Brief. The decision is inconsistent with the law and majority circuits.

REASONS FOR GRANTING THE WRIT

Writ of Certiorari is sought for the additional reasons that:

- The Court of Appeals' split decision is in conflict with *Erickson v. Trinity Theatre, Inc.* and prior decisions in its circuit and all the other majority circuits as well as and the Copyright Act, 17 U.S.C. § 101, § 201(a), § 204(a), § 202.1, and § 507. Most notably and respectfully, there is not a scintilla of evidence of intent in the lower court record to support the Court of Appeals' decision. (1) There was no evidence of intent on the record [App. pg. 61a] by Farag to be a joint author as evidenced in his counter-claim and declaration. [App. pgs. 10a, 11a, 15a, 16a, 41a and 54a-63a] (2) Mr. Farag repudiated any

interest of being a copyright owner. [App. pg. 5a] (3) Mr. Farag also filed a U.S. bankruptcy petition [App. pgs. 7a and 42a] and did not list the song as an asset. (4) At trial, Farag stated he did not contribute to the song. (Pet. Appeal Brief, pgs. 20 and 21) (5) Respondent's CEO Batistatos stated in the lower court record that he alone contributed his ideas to the song. (6) Farag's inconsistent and vacillated position showing there was no collaborative intent. [App. pgs. 5a, 7a, 10a, 15a, 16a and 61a] (7) The Court of Appeals' August 3, 2009, decision will create more legal havoc and problems in the Seventh Circuit and other circuits. (8) The Court of Appeals' panel must correct an unjust decision and be judicially estopped in creating inconsistent legal positions. (9) Respondent filed pleadings, knowing that Farag is not the joint author. [App. pgs. 5a, 7a, 8a, 15a, 16a and 54a and 63a] (10) Respondent's hands are not clean. (11) The Court of Appeals holding and reversing the lower court's correct decision for Respondent when there was not any privity with the author Janky and Respondent lacks standing in asserting co-authorship for Farag who filed bankruptcy disavowing interest in the song. [App. pgs. 3a, 5a, 7a, 15a, 16a and 41a] The appeal panel's split decision overlooked the law, copyright statutes, facts and the correct decision by Judge Cherry rendered in March 2007 and the confirmed jury award.

- The Court of Appeals reversed the judgment on material misrepresentation holding that the Respondent had an unwritten sales or license agreement to use Petitioner's song was in error

[App. pgs. 9a and 54a-63a] in absence of a written instrument to transfer or assign the song to the Bureau violates the Copyright Act, 17 U.S.C. § 204(a). There was no written agreement between Petitioner, Respondent or Farag to use the song which triggered Petitioner to file her infringement action. [App. pg. 7a]

- Farag and Respondent are judicially barred in asserting a joint authorship, 17 U.S.C. § 507(b); *Stone v. Williams,* 970 F.2d 1043, 1049-50 (2d Cir. 1992); *Merchant*, 92 F.3d 56. Had Farag asserted a claim for joint authorship as the Court of Appeals ruling claims, accrued on October 2006. Petitioner, Janky, filed her infringement on October 2003, within the three (3) year statute of limitation. Farag has never asserted a claim within the three (3) years, 17 U.S.C. § 507(b).

- The Court of Appeals holding several words offered by Speros Batistatos to Farag for Janky's consideration to use Batiststos' ideas shows that there was no intent or a copyrightable product for the decision to stand. [App. pgs. 15a, 16a and 54a-63a]

- The Court of Appeals' decision will cause major problems daily in the creative world among artists, creative persons in the literary, music, business offices, science, etc. when "intent" and/or copyrightability is not a requisite to create a joint collaborative work product. [App. pgs. 15a, 16a]

- The district court overlooked the fact that Respondent used Farag as a straw man and he does not have any right when he disavowed having any interest in the song. [App. pgs. 7a, 15a, 16a and 52a-63a]

- The district court granted greater rights to Respondent that exceeded the rights of Farag who disavowed having rights or any interest in the song by his counterclaim. [App. pgs. 15a, 16a and 52a-63a] This position affects all court circuits, licensing arrangements, assignments and contractual transactions the case has far reaching negative results to all creative persons.

ARGUMENT

I. THE PANEL'S SPLIT DECISION CONFLICTS WITH ITS 7TH CIRCUIT DECISION, PRIOR DECISIONS AND THE COPYRIGHT ACT THAT INTENT AND COPYRIGHTABILITY UNDER ERICKSON ARE NOT NECESSARY TO CREATE A JOINT AUTHOR WORK PRODUCT IS INCONSISTENT TO THE LAW, COPYRIGHT ACT AND MAJORITY CIRCUITS.

In review of the Court of Appeals' decision that the infringing party or the user of the song, Lake County Convention Visitors Bureau, Respondent, arguing on behalf of Farag who did not appeal for joint authorship is judicially barred under 17 U.S.C. § 507(b). Farag indicated by his counterclaim [App. pgs. 7a, 15a, 16a and 54a-63a] there was no intent to be a co-author. This is inconsistent with the law of the 7th Circuit, majority circuits, the Copyright Act and case law,

Erickson v. Trinity Theatre, Inc. 13 F.3d 106, 1071 (7th Cir. 1994); *Childress v. Taylor* 945 F.3d 644 (7th Cir. 2004); *Gaiman v. McFarlane* 360 F.3d 644 (7th Cir. 2004); 17 U.S.C. § 101; *Seshadri v. Kasraian,* 130 F.3d 798, 803-04 (7th Cir. 1997); *Thompson v. Larson*, 147 F.3d 195 (2d Cir. 1998); *Merchant v. Levy*, 92 F.3d 51 (2d Cir. 1996); *Zuill v. Shanahar*, 80 F.3d 1366 (9th Cir. 1996); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406 (2d Cir. 1946). The record is clear that Farag filed a counter-claim against Janky disavowing his intent to be a co-author as to the copyright she filed. Thereafter, Farag filed bankruptcy consistent with his counterclaim, disavowing his interest. This was grossly overlooked by the panel that ruled in favor of the Respondent. [App. pgs. 15a, 16a and 41a] Farag also noted this in his bankruptcy petition filed in the 7th Circuit that the song is not an asset.

Speros Batistatos provided testimony on the issue of intent as follows: "When the song was first presented to me by Henry Farag in my office where we made some pretty substantial revisions..." [App. pg. 15a]

(R.345, p. 15, Line 15) ***"I personally made [changes] to the lyrics, including the words "Chicago's neighboring South Shore..."***

"I'm saying, he brought me the first draft" (Janky's song)

(R.345, p. 15, Line 18) "It did not include Lake County our tag line..."

(R.345, p. 16, Line 17) ***"I was suggesting again inclusion of Lake County, inclusion of Chicago's neighboring South Shore..."***

Farag brought Batistatos' ideas to Janky to modify her song if she agreed. [App. pg, 5a] Speros Batistatos, not Farag, called out the shots or made all the suggested ideas and Janky agreed to insert Batistatos' ideas "without knowing" who offered them and there was no meeting of the minds to have Janky to be a joint author with Speros Batistatos or Farag, 17 U.S.C. § 101, *Erickson, Supra* at 1061. [App. pgs. 58a and 59a]

Most notably, Farag was not a joint author but a paid partner agent of the Respondent to get Janky, to modify her created song under the direction of Mr. Batistatos. [App. pgs. 5a, 15a, 16a and 54a-63a]

Farag admitted during the trial it was Respondent CEO, Speros Batistatos, who made suggestions and that he took notes and told Janky what the song ideas were that the Respondent would accept from her song [App. pg. 5a] (R.349, pgs. 14, 15, lines 21-25, pg. 15, lines 1-3). Farag testified in open court that it was Respondent CEO who offered his ideas and admitted being paid. Farag was asked did he (Farag) make any changes to Janky's song. Farag responded, **"No."** [Pet. Appeal Brief pgs. 20, 21, 22 and 23] Farag's lack of intent and being paid as the agent on the record was grossly and erroneously overlooked by the Court of Appeals to prove any joint authorship. The lower court took judicial notice of Farag's payment and the lack of intent was not established to conclude a joint authorship. [App. pg. 61a] The facts and the Court of Appeal panel's decision violates all circuits' decisions

in the Copyright Acts, 17 U.S.C. § 201(a) and 17 U.S.C. § 101. The mere fact that Farag carried ideas and information as a runner between the Respondent and Petitioner were insufficient to establish intent for Farag to be a joint author, *Erickson v. Trinity Theatre, Inc.* 13 F.3d 106, 1071 (7th Cir. 1994); *Childress v. Taylor* 945 F.3d 644 (7th Cir. 2004); *Gaiman v. McFarlane* 360 F.3d 644 (7th Cir. 2004); 17 U.S.C. § 101. The district court's decision shows that Farag nor Respondent met the elements of intent and copyrightability required by the aforementioned cases. [App. pg. 61a] The Court of Appeals abused its discretion when the court record is void of intent.

Furthermore, Judge Ripple the dissenting judge is correct and stated that Farag's statement and filed pleadings support that the record is void of intent to be a joint author. [App. pgs. 15a and 54a-64a] Farag's counterclaim stated that his name on the copyright was mistakenly asserted by Petitioner Janky as a novice filer of the copyright application who desired to give him credit and was a forgery. [App. pgs. 15a, 16a, 55a, 58a and 59a] This admission also shows that the "intent to collaborate" was missing between the parties. [App. pgs. 15a, 16a, 55a and 56a-59a]

All filings by Respondent were to mislead the court with material misstatements that were false and fraudulently asserted. [App. pgs. 5a, 15a, 16a and 53a-63a] There was no evidence before the lower court or the 7th Circuit panel that Farag intended to be a joint owner/author. [App. pgs. 5a, 15a, 16a and 53a-63a] His declaration indicated no affirmative intent to be a co-owner. Farag once vacillated he was the sole owner. [App. pgs. 15a and 16a] The panel's decision

undermines *Erickson* and violates 17 U.S.C. § 101 and 17 U.S.C. § 204(a) that intent must be established.

Furthermore, in Farag's affirmative defense, he asserted that Janky did not own the copyright at issue. [App. pgs. 16a and 53a-63a] This position contradicts Respondent's and does not have standing to assert a claim that Farag is a joint owner or intended to create a joint authorship with Respondent. [App. pgs. 16a and 53a-63a]

The suggestions made by Respondent's CEO Batistatos to his partner Farag were several short words, "Lake County, Chicago's neighboring South Shore" and do not meet the standards to be copyrightable or protected by the Copyright Act, 37 C.F.R. §202.1 (2004); *Alberto-Culver Co. v. Andrea Dumon, Inc.* 466 F.2d 705, 711 (7th Cir. 1972). [App. pgs. 5a, 16a and 17a] The record confirms that the changes were not Farag's and he did not intend to be a joint author or collaborator with the Petitioner. [App. pgs. 5a, 15a, 16a and 53a-63a]

Erickson is the standard and the law that the majority circuits follow as well. Petitioner states the lower court had sufficient evidence on the record that summary judgment and jury award was properly rendered in favor of Janky and the jurors reaffirmed Judge Cherry's decision based on the recorded facts and law.

A. Petition for Writ of Certiorari that Petitioner Requests the Court to Observe the 7th Circuit Precedent of Erickson v. Trinity Theatre and Maintain Uniformity of the Court's Decisions.

It is imperative that the Supreme Court take judicial notice of *Erickson v. Trinity Theatre, Inc.* 13 F.3d 106, 1071 (7th Cir. 1994). In the Petitioner's request for Writ of Certiorari, the Court or Appeals raised the question, "Was Janky the only author? If not, can it be Respondent? Respondent did not seek to be the author, nor Farag. Even if Respondent or Farag had asserted to be a joint author, the party would have been judicially time barred under 17 U.S.C. § 507(b) and *Stone v. Williams*, 970 F.2d 1043, 1049-50 (2nd Cir. 1992). Respondent raises a claim as joint author for Farag beyond the three (3) year statute time period more than two (2) years late.

Based on the record hereof and under *Erickson*, the 7th Circuit's precedent and the majority circuits that observe *Erickson*, the Court of Appeals panel's decision, Petitioner requests the decision to be respectfully corrected and consistent with judicial decisions. The Respondent argued on behalf of Farag without his authorization and did not demonstrate or show that Farag possessed the requisite intent to create a joint work. [App. pgs. 15a, 16a and 56a] The element of intent is the first required element that must be observed under *Erickson*, prior decisions hereof and the Copyright Act, 17 U.S.C. § 101 before the court gets to the copyrightability of the created work. [App. pgs. 56a and 57a] Both elements were lacking in the court's record.

B. Majority / Other Circuits

The majority circuits observe *Erickson* and the Copyright Act, 17 U.S.C. § 101. There are two elements that the 7th Circuit follows as well as the other circuits and they are: (1) intent to create a joint work; and (2) contribution of independently copyrightable material, *Erickson v. Trinity Theatre, Inc.* 13 F.3d at 1068 and the 7th Circuit observes 2nd Circuit *Childress v. Taylor* 945 F.2d 500 (2d Cir. 1991); *Weinstein v. University of Illinois,* 811 F.2d 1091 (7th Cir. 1987); *Community for Creative Non-Violence v. Reid* 846 F.2d 1485, 1498 (D.C. Cir. 1988); *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.* 499 U.S. 340 (1991); *Harper & Row Publisher, Inc. v. Nation Enter* 471 U.S. 539 (1984). The current decision by the 7th Circuit was adopted by the Court of Appeals based on misleading pleadings by Respondents that go against the law and evidence in this case and the law of the 7th Circuit, will cause other litigants to disregard *Erickson.* The decision in Petitioner Janky's case causes a travesty and negates the creative process in the country among the majority circuits. The district court's decision must be reaffirmed and the Writ of Certiorari is a necessity to be granted in addressing the decision of August 3, 2009 to be corrected in favor of the original creator and author Cheryl Janky, Petitioner as decided by the lower court was never paid for her created work, but the disavowed party Farag was.

II. THE COURT OF APPEALS PANEL ALSO DISMISSED THE SECOND ELEMENT OF ERICKSON AND THE COPYRIGHT ACT, 17 U.S.C. § 101 THAT THE FEW WORDS OFFERED BY FARAG FROMBATISTATOS WERE COPYRIGHTABLE AND SUFFICIENT TO CREATE A JOINT AUTHORSHIP WITH JANKY'S CREATED WORK PRODUCT

It is Petitioner's position that the appeal court also overlooked 17 U.S.C. § 101 and 201; *Erickson Supra* and the evidence that the reversal for the Respondent is contrary to the 7th Circuit decisions and the law in the majority circuits. This also creates more havoc for the other circuits.

It is correct that Farag offered the suggested changes he received from Respondent, LCCVB, and were mandated by the CEO to deliver them to Petitioner Janky from Batistatos [App. pg. 5a] (R.345, pp. 4-17 and R.349, pp. 14-16). The ideas were dictated by Respondent's CEO Batistatos to focus on ***Lake County and Chicago's neighboring South Shore.*** [App. pgs. 16a and 53a-63a] Farag, in the court record, states all the changes recommended were from Respondent's CEO, Batistatos. Farag and Respondent's CEO, Batistatos, confirmed the process (R.345 and R.349, Supra) (Petitioner's Appeal Brief, pgs. 20, 21 and 22) in respective of the words being sparsely and short. The words alone [App. pg. 63a] will not qualify for copyrightability as required by 17 U.S.C. § 204(a); *Publication Int., Ltd. v. Meredith Corp.* 88 F.3d 473, 478 (7th Cir. 1996); *Alberto-Culver Co. v. Andrea Dumon, Supra* or *Erickson Supra* or the majority circuits. [App. pg. 16a] The panel misapprehended that Farag or the Respondent must

meet both elements. [App. pgs. 53a-63a] The appeal panel erred in ruling in favor of the Respondent that benefits Farag as a co-author who did not appeal the decision. As stated the Respondent did not meet the 2 prong test of *Erickson;* 17 U.S.C. § 201(a) and the majority of the circuits. There is compelling reasons for the court to grant a Writ of Certiorari to protect the creative process and to avoid an avalanche of legal conflicts among the circuits.

CONCLUSION

For reasons stated hereof, the Petitioner requests her Petition for Writ of Certiorari be granted to correct an erroneous decision based on misleading pleadings by Respondent that caused the Court of Appeals to misapprehend facts, law and Copyright Act to eviscerate uniformity of among the majority circuits. Depriving Petitioner's rights in her song to a non-contributing party, Farag, violates the law under *Erickson*; 17 U.S.C. § 204(a) and the majority circuits. In essence to "think" that Farag is a joint author, which he vehemently and repeatedly denies, undermines the laws of the 7th Circuit and all other circuits.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 07-2350, 07-2762 & 08-1606

[Filed August 3, 2009]

CHERYL JANKY,	)
	)
Plaintiff-Appellee / Cross-Appellant,	)
	)
v.	)
	)
LAKE COUNTY CONVENTION AND VISITORS BUREAU,	)
	)
Defendant-Appellant / Cross-Appellee.	)
	)

Appeals from the United States District Court
for the Northern District of Indiana,
Hammond Division.
No. 05 C 217—**Andrew P. Rodovich**,
Magistrate Judge.[1]

[1] Most of the heavy lifting in this case was done by Magistrate Judge Paul R. Cherry. Judge Cherry recused himself after the

ARGUED OCTOBER 28, 2008—
DECIDED AUGUST 3, 2009

Before BAUER, RIPPLE, and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*. This over-litigated case, involving a song by a doo-wop group, comes to us with 18 district court orders and memorandum opinions spread over a combined 239 pages. The district court's 46-page docket contains a staggering 371 entries. And the briefs of the parties on appeal are a bit unfocused to say the least. But although it's a tough job, someone has to do it, so with shoulder to the wheel, we forge on.

Lake County, Indiana, is the home of Gary, a gritty industrial town southeast of Chicago. But there's much more to Lake County than Gary—including miles of pristine beachfront along the Indiana Dunes National Lakeshore—and the Lake County Convention and Visitors Bureau (the Bureau) wants you to know that. To get the word out, the Bureau commissioned a tune singing the county's praises, the distribution of which led to this lawsuit for copyright infringement. Cheryl Janky says she composed the song and never gave the Bureau permission to use it. The Bureau maintains that Janky was only a co-author and that it had the authority to use the song by licensing it from the other song-writer, Henry Farag. The district court entered partial summary judgment in favor of Janky—deciding that she was the sole author—and a jury awarded her $100,000 in damages. The Bureau now appeals, contending that summary judgment was improper

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case was tried to a jury, and Magistrate Judge Andrew P. Rodovich picked it up at that point.

given the evidence of co-authorship. In the alternative, the Bureau submits that the district court erred when it denied a motion for remittitur or new trial in light of Janky's failure to mitigate damages. Janky cross-appeals from an order concerning the imposition of sanctions against her counsel under Rule 11.

Before we get to the underlying facts, we need to assess our jurisdiction. *See Mostly Memories, Inc. v. For Your Ease Only, Inc.*, 526 F.3d 1097 (7th Cir. 2008) ("A court of appeals has an obligation to examine its jurisdiction sua sponte, even if the parties fail to raise a jurisdictional issue.") (quoting *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 660 (7th Cir. 1998)). The Bureau has made this task more complicated than usual because its brief is defective. At oral argument the Bureau clarified that it seeks, first and foremost, review of the summary judgment decision. However, that is not at all apparent from the Bureau's brief, which neither references the lower court's summary judgment opinion within the jurisdictional statement nor includes that opinion within its short appendix, all in violation of the applicable rules. *See* Fed. R. App. P. 28(a)(4), 30(a); 7th Cir. R. 28(a)(2), 30(a). Janky's brief isn't any better. Although we take these rules seriously, we are nonetheless willing to forgive the violation in this case because we do in fact have jurisdiction. To be sure, the Bureau was not permitted to appeal as of right following the grant of partial summary judgment. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) ("[P]artial summary judgment[s] limited to the issue of [a] petitioner's liability . . . are by their terms interlocutory, see Fed. Rule Civ. Proc. 56(c), and where assessment of damages . . . remains to be resolved have never been considered to be 'final' within the meaning of 28 U.S.C.

§ 1291."). So we do not fault the Bureau for waiting to appeal until the denial of its motion for new trial or remittitur. And though the Bureau did a poor job of explaining exactly what it seeks, we are satisfied that the denial of the motion for new trial or remittitur implicates all prior orders, including the decision on summary judgment. With that sorted out, then, we can turn to the facts.

Janky and Farag were members of "Stormy Weather," an Indiana-based doo-wop group.[2] Farag heard through the grape vine that the Bureau was looking for a song to represent Lake County, and he suggested that the band might want to give it a shot. Janky took the initiative. After Farag made the announcement, she got to work writing the music and lyrics for a tune she called "Wonders of Indiana" (a.k.a.

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[2] Doo-wop is characterized by vocal harmonies. It became popular in the 1950s and 1960s with the arrival of groups like **The Five Satins** ("In the Still of the Night"), **The Platters** ("My Prayer"), **The Skyliners** ("Since I Don't Have You"), **The Turbans** ("When You Dance"), **The Penguins** ("Earth Angel"), **The Crystals** ("Da Doo Ron Ron"), **Frankie Lymon and the Teenagers** ("Why Do Fools Fall in Love?"), and the incomparable **Drifters** ("There Goes My Baby," "This Magic Moment," "Save the Last Dance for Me," "Under the Boardwalk," and "Up on the Roof"). According to Stormy Weather's Web site, the group is "the chief proponent of the nation's revitalized a cappella doo-wop sound." Stormy Weather has produced 14 albums, including "Street Carols" (a "holiday classic," says its Web site) and "Doo-Wop & Lollipops." The group has also performed with the likes of **Smokey Robinson, Franki Valli,** and **Dion Francis DiMucci** (who, as **Dion**, made it big with hits like "Runaround Sue" and "The Wanderer"). The group reports that it has traveled around the world keeping "the a cappella sounds of the street corner alive, well, and kickin'." www.stormy-weather.com (last visited Nov. 26, 2008).

"Indiana"). When it was complete, Janky obtained a copyright for the song (in May 1999), listing herself as the sole author. Janky then showed the song to Farag. Although Farag thought it had potential, he recommended revising the lyrics to better suit the Bureau's vision. Pursuant to a conversation with the Bureau's chief executive officer, Farag suggested that the song needed to focus more on Lake County in particular, as opposed to Indiana in general, and include references to the area as "Chicago's neighboring south shore" and to its ethnic diversity. Janky testified that Farag's recommendations, which she adopted, accounted for 10 percent of the lyrical content. With the song revamped, Janky filed a new copyright registration form in December 1999, this time listing Farag as a co-author who provided "additional lyrics" and styling the effort a "joint work." Similarly, she filed a document with the American Society of Composers, Authors and Publishers (ASCAP) stating that Farag held a 10 percent "ownership share." She now says that was all a mistake.

According to Janky, Farag was not a co-author and she did not intend to give him credit as such. Rather, she testified that she placed Farag's name on the registration form "as an indication of [her] gratitude . . . and to demonstrate that [she] appreciated every little bit of support." She said she now realizes that the proper way to acknowledge a "de minimis" contribution is by making a notation on the album cover.

Farag sees it differently. He says the lyrical changes were "significant," and revisions were also made to the melody.

This difference of opinion did not manifest itself immediately, however. For the time being, there was music to be made. Janky, Farag, and the rest of Stormy Weather recorded a demo of the song at Thunderclap Studios in Hammond, Indiana. They followed that up with a music video and presented their work to the Bureau for review. The Bureau was satisfied—it would be a great marketing tool. And Stormy Weather was a generous partner. Rather than seeking to extract a profit from the venture, Stormy Weather agreed to allow the Bureau to use the video and song in return for the costs of production. Beyond that, the group decided the publicity generated from the Bureau's use of the material would be payment enough. Farag issued a nonexclusive license to the Bureau to that effect.

The Bureau's first use of the song came on December 1, 1999. The Bureau opened a new visitor's center that day, and it commemorated the occasion not only by playing the music video, but also with a live performance. When Stormy Weather completed production of the album on which the song ultimately appeared—"Doo-It Doo-Wop," published by Street Gold Records—in June of 2000, the Bureau purchased 1,500 copies to resell at the visitor's center.[3] Beginning around the same time, the Bureau treated callers

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[3] When it released the album, Stormy Weather renamed the tune "Lake County, Indiana." There is no dispute, however, that this was the same song registered in December 1999.

placed on hold to the sounds of Stormy Weather, and it frequently played the song at the visitor's center and used it in promotional ads. So passed the next three years.

On July 15, 2003, Janky filed yet another copyright registration form, ostensibly to correct the "mistake" she had made in the previous form. Janky omitted Farag's name, listing herself as the sole author of the music, lyrics, and "arrangement performance." And at some point in time she notified the Bureau that she was the exclusive owner. However, the Bureau did not stop using the tune until she filed this lawsuit against it in October 2003.

Janky alleged in her complaint (just like in her latest registration form) that she was the sole author of the song and had a valid copyright in the tune to the exclusion of Farag. As a result, so the theory went, Farag's license to the Bureau was without effect and the latter's use of the song illegal. Although Janky originally filed her complaint in the Eastern District of Michigan and named Farag and Street Gold as additional defendants, the case was transferred to the Northern District of Indiana early, and the matter was stayed against Farag and Street Gold pursuant to bankruptcy proceedings. The parties thereafter consented to have a magistrate judge handle the case. After conducting discovery, cross-motions for summary judgment were filed. In March of 2006, the magistrate judge issued his summary judgment decision in favor of Janky. A jury trial, on damages, was conducted a year later, in March of 2007.

The main issue—both in the district court and here on appeal—is whether Janky holds the copyright to

the song by herself or whether she shares it with Farag as a co-author. In general, individuals are co-authors of a work only where they (1) intend to create a joint work; and (2) contribute independently copyrightable material. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994). Applying this standard, the magistrate judge found in favor of Janky on both scores. First, he found that a jury would have no choice but to conclude that Farag and Janky didn't intend to be co-authors at the time of creation. Second, he found that Farag's contributions were nothing more than "minimal revisions" of a song Janky already composed.

We disagree with that analysis, which we review *de novo*. *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 677 (7th Cir. 2008). But before we get too much further, a bit more on the background law.

A plaintiff alleging copyright infringement must establish two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. V. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Janky's satisfaction of the second element is in little dispute. An individual "copies" another's work for purposes of copyright law if he plays it publicly or distributes copies without the copyright owner's authorization. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157 (1975); *see also ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) ("Copyright law forbids duplication, public performance, and so on, unless the person wishing to copy or perform the work gets permission[.]"). The Bureau concedes that it played and distributed the song that Janky claims as her sole creation. And no one questions that the song enjoys

copyright protection. The question is, was Janky the only author? If not—if Farag was a co-author—then Janky does not own the copyright exclusively, and the Bureau had a right to use the song with Farag's permission.

On, then, to the legal framework of joint authorship. Under 17 U.S.C. § 201(a), "[t]he authors of a joint work are co-owners of copyright in the work." In other words, "the joint authors hold undivided interests in [the] work, despite any differences in each author's contribution." *Erickson*, 13 F.3d at 1068. The benefits of co-authorship are therefore significant: each author may use or license the joint work. *Id.*

But when does a song qualify as a "joint work"? Section 101 of the Copyright Act defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. In *Erickson*, we determined that this language requires (1) intent to create a joint work; and (2) contribution of independently copyrightable material.[4] *Erickson*, 13 F.3d at 1068, 1071. With respect to the first element, we explained that the intent prong does not have to do with the

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[4] Later, in *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004), we identified an exception to the requirement of independent copyrightability. However, that exception obtains only when none of the constituent parts could pass the test of copyrightability due to "the nature of the particular creative process," e.g., the creation of a comic book by a writer, a penciler, an inker, and a colorist. *Id.* at 659. The exception is not applicable in this case because Janky's work was copyrightable before Farag got on board.

collaborators' intent to recognize each other as co-authors for purposes of copyright law; the focus is on the parties' intent to work together in the creation of a single product, not on the legal consequences of that collaboration. *See id.* At 1068-69. We also noted that "'billing' or 'credit' may be evidence of intent to create a joint work." *Id.* at 1072 (internal quotation marks omitted). As to the second element, we rejected Professor Nimmer's "de minimis" test, which posits that a joint work exists whenever there is "more than a de minimis contribution by each author." *Id.* at 1070. The standard we embraced requires more than that: a contribution that is independently copyrightable. Measured against this standard, we held that the putative joint author of a play was not a joint author where his contributions were limited to "[i]deas, refinements, and suggestions." *Id.* at 1072. "[S]tanding alone," we said, these contributions were "not the subject of copyright." *Id.*

As in *Erickson*, the first question for us is whether Farag and Janky intended to create a joint work. Janky certainly denies that now, but that is irrelevant. The issue is whether Janky and Farag "intended to be joint authors at the time the work was created." *Id.* at 1070. We think they did, so much so that Farag was entitled to summary judgment on this point. Unlike *Erickson*, where an individual made minor *suggestions* but the final decision belonged "entirely" to the principal playwright, *id.* at 1072, the song here was the product of Janky *and* Farag. Farag wielded considerable control over what the song finally looked like; one could even say he demanded the changes. More important, however, is the evidence of intent supplied by Janky herself. We observed in *Erickson* that crediting another person as a co-author is strong

evidence of intent to create a joint work. *See id.* at 1072; *see also Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991) ("Though 'billing' or 'credit' is not decisive in all cases and joint authorship can exist without any explicit discussion of this topic by the parties, consideration of the topic helpfully serves to focus the factfinder's attention on how the parties implicitly regarded their undertaking.") (footnote omitted). In this case, we have such an acknowledgment—Janky named Farag a co-author and deemed the song a "joint work." Janky's post hoc rationalization—that she only intended to express her gratitude—is simply at odds with the significant contributions made by Farag and Janky's identification of Farag as a co-author in the copyright registration form. Just as litigants "cannot create sham issues of fact with affidavits that contradict their prior depositions," *Lorillard Tobacco Co. v. A & E Oil, Inc.*, 503 F.3d 588, 592 (7th Cir. 2007) (internal quotation marks omitted), Janky's affidavit cutting the other way is entitled to little weight. A reasonable jury could only conclude that Janky and Farag intended to create a joint work.

As to the second element—independent copyrightability—we think the situation here differs considerably from *Erickson*. Farag's contributions went beyond general "[i]deas, refinements, and suggestions." They were concrete expressions and thus pass the test of copyrightability where mere ideas fail. *Gaiman*, 360 F.3d at 658. In addition, while Farag's changes may have accounted for only 10 percent of the lyrics, they were significant. They were important not only to the final sound, but also to its commercial viability. Before Farag became involved, the song celebrated the charm of Indiana as a state; Farag

shifted the focus to Lake County. Without Farag's input, it is unlikely that the Bureau would have embraced the song the way it did. And though we think any reasonable jury would agree with us on this point, that doesn't actually matter. Under our precedent, "copyrightability is always an issue of law." *Gaiman*, 360 F.3d at 648 (citing *Publications Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir. 1996)).

Despite this conclusion, however, we admit that this is a close case. Farag contributed ideas and gave expression to those ideas, but had he done much less, his work would not garner the protection of copyright. We have observed in the past that published creations are almost always collaborative efforts to some degree—peers make suggestions, editors tweak words, and so forth. *See id.* at 658. Were we to deem every person who had a hand in the process a co-author, "copyright would explode." *Id.* On the other hand, the very purpose of copyright law is to promote the progress of the arts and sciences, U.S. CONST. art. I, § 8, cl. 8; *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 507 (7th Cir. 1994), a purpose that is defeated if important contributions are denied copyright protection. Placing a contribution in one hopper or the other is not always an easy task, and the judge here made a commendable effort. In the end, though, this doo-wop ditty is a joint work.[5]

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[5] Janky may still have a cause of action against Farag for an accounting of profits, *see Gaiman*, 360 F.3d at 652; *Erickson*, 13 F.3d at 1068, but that possibility has no bearing on the appeal before us.

That leaves only one loose end—Janky's cross-appeal.[6] After the district court handed down its summary judgment decision, it levied $2,500 in sanctions against Janky's attorney, Gregory Reed, under Rule 11 of the Federal Rules of Civil Procedure. The court found that Reed filed a motion for injunctive relief without any legal or factual support. (Reed wanted the Bureau to stop selling the song, but it hadn't done so for several years.) When the jury returned a verdict for Janky in the amount of $100,000, the parties jointly sought to reduce the judgment by the amount owed in Rule 11 sanctions. It is only logical, however, that Reed was the driving force behind this request—the cost to the Bureau would be the same either way, but paying the Rule 11 sanctions out of Janky's judgment would save Reed $2,500. In other words, Reed sought to use funds from his client's victory to pay for a penalty he had incurred all by himself. The district court was not impressed; not only would this proposal shift the burden to an innocent party (Janky), it would violate the terms of Rule 11(c)(5)(A), which provides that monetary sanctions shall not be imposed against a represented party for frivolous legal contentions. Reed apparently does not dispute the propriety of sanctions in the first instance, but he insists that the court abused its

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[6] The Bureau also appealed from the district court's ruling on another motion for sanctions (Court of Appeals Case No. 08-1606). However, the Bureau never mentioned that issue in its principal or reply brief—not so much as an argument header! Perhaps the Bureau was overwhelmed by the sheer amount of paper filed in this case. Whatever the reason, this issue is waived for lack of development. *See Kochert v. Adagen Med. Int'l, Inc.*, 491 F.3d 674, 679 (7th Cir. 2007).

discretion in denying his request for a setoff.[7] We highly doubt that. But we need not decide the issue because it is mooted by our conclusion that the Bureau is entitled to summary judgment—there is now no verdict from which sanctions can be deducted.

For these reasons, the judgment is REVERSED and the Case REMANDED so that summary judgment can be entered in favor of the Bureau, and for such further proceedings that may be necessary.

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[7] That's certainly how Reed framed the issue on the notice of appeal and jurisdictional statement. However, to the extent Reed thinks sanctions were inappropriate to begin with, we have considered that issue and find no error.

RIPPLE, *Circuit Judge*, dissenting. I agree with the majority that the district court improperly granted Ms. Janky summary judgment on the issue of copyright ownership. However, I cannot agree with the majority's conclusion that the Bureau is entitled to summary judgment under our precedent in *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994). I therefore must respectfully dissent.

In reviewing the district court's grant of summary judgment, "we consider only those matters that were before the district court when it entered the judgment." *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1024 (7th Cir. 2003) (citation and quotation marks omitted). To establish that Ms. Janky and Farag intended to create a joint work under *Erickson*, the Bureau needed to show (1) that Farag and Ms. Janky "intended to be joint authors at the time the work was created" and (2) that Farag's contributions to the song were independently copyrightable. *See Erickson*, 13 F.3d at 1071. When the district court considered Ms. Janky's motion for summary judgment on copyright ownership, there was little evidence regarding Farag's intent to become a joint author. In its motion opposing summary judgment, the Bureau presented a certificate of registration for a joint copyright as evidence of Farag's intent. *See* R.71, Ex. 2. However, Farag stated in his counterclaim that his name was forged on the copyright application, which cast doubt on the Bureau's claim that Farag intended to create a joint authorship. *See* R.64, Ex. B-1.

Farag stated in his declaration that he was an "owner and/or co-owner" of the song, R.29, Ex. 6 at ¶ 6, and Ms. Janky's declaration acknowledged that Farag

revised her original work "by 10%," R.29, Ex. 1 at ¶ 5. Nevertheless, there was no evidence before the district court establishing that Farag intended to create a joint work, as required under *Erickson*, 13 F.3d at 1071. Moreover, Farag's notice of affirmative defenses stated that Ms. Janky did not own the copyrights at issue, R.64, Ex. B-2 at ¶ 8, a view that undermines the Bureau's claim that Farag intended to create a joint authorship with Ms. Janky.

In finding that Farag intended to be a joint author, the majority emphasizes the fact that "Farag wielded considerable control over what the song finally looked like" and that Ms. Janky credited him in the copyright application. *Ante*, at 11. The factors of decisionmaking and billing were discussed briefly in *Erickson* and at greater length in a subsequent Second Circuit opinion. *See Thomson v. Larson*, 147 F.3d 195,202-03 (2d Cir. 1998) (citing *Erickson*, 13 F.3d at 1071-72). However, even if we take these factors into account in our analysis, the record at summary judgment does not show that Farag possessed the requisite intent to create a joint work. *See Erickson*, 13 F.3d at 1071. Consequently, the first requirement for joint authorship has not been met.

I also believe that the Bureau has failed to establish that Farag's "contributions to the [work] were independently copyrightable." *See Erickson*, 13 F.3d at 1071. As the majority observes, we know that Farag's contributions to the lyrics were his suggestion to Ms. Janky that the song focus on Lake County specifically, and the specific suggestion that the song include a reference to "Chicago's neighboring south

shore"[1] and to its ethnic diversity. These contributions do not rise above mere "[i]deas, refinements, and suggestions." *Id.* at 1072.

I do not think that the record before us allows us to affirm summary judgment for Ms. Janky or to grant summary judgment to the Bureau on the issue of copyright ownership. I would remand this case to the district court for further proceedings on the merits.

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[1] Short phrases are generally not entitled to copyright protection. 37 C.F.R. § 202.1 (2004); *see also Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972). Consequently, Farag's addition of the phrase "Chicago's neighboring south shore" is not sufficient to establish that his contribution was independently copyrightable.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

[SEAL]

Office of the Clerk
Phone: (312) 435-5850
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FINAL JUDGMENT

August 3, 2009

BEFORE:

WILLIAM J. BAUER, Circuit Judge

KENNETH F. RIPPLE, Circuit Judge

TERENCE T. EVANS, Circuit Judge

Nos.: 07-2350, 07-2762 and 08-1606	CHERYL JANKY, Plaintiff-Appellee/Cross-Appellant v. LAKE COUNTY CONVENTION AND VISITORS BUREAU, Defendant-Appellant/Cross-Appellee

Originating Case Information:

District Court No: 3:05-cv-00217-APR
Northern District of Indiana, Hammond Division
Magistrate Judge Andrew P. Rodovich

The judgment of the District Court is **REVERSED**, with costs, and the case **REMANDED** so that summary judgment can be entered in favor of the Bureau, and for such further proceedings that may be necessary. The above is in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment** (form ID: **132**)

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CASE NO. 3:05-CV-217-PRC

[Filed May 16, 2007]

CHERYL JANKY, Plaintiff, v. LAKE COUNTY CONVENTION & VISITORS BUREAU, Defendant.	)))))))))

ORDER

This matter is before the Court on Defendant Lake County Convention & Visitors Bureau's FRCP 59 Motion for Remittitur or in Alternative New Trial on Damages [DE 247], filed on March 29, 2007. On April 12, 2007, Plaintiff Cheryl Janky filed a response in opposition to LCCVB's Motion. On April 19, 2007, LCCVB filed a reply in support of its Motion. For the following reasons, the Court denies the Motion.

PROCEDURAL BACKGROUND

Cheryl Janky filed her Complaint in this matter on October 3, 2003, in the United States District Court for the Eastern District of Michigan. On March 31, 2005, by order of United States District Court Judge Paul D. Borman of the Eastern District of Michigan, venue transferred to the Northern District of Indiana.

On July 21, 2005, LCCVB filed a motion for summary judgment. On November 9, 2005, Ms. Janky filed her own motion for summary judgment. On March 29, 2006, the Court issued an order granting in part and denying in part LCCVB's motion for summary judgment. The Court dismissed Ms. Janky's state law claims against LCCVB and granted Ms. Janky summary judgment on her federal copyright claim. In the same order, the Court denied as moot Ms. Janky's motion for summary judgment.

On April 18, 2006, LCCVB filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 60 of the Court's March 29, 2006, summary judgment order. On May 15, 2006, the Court issued an order denying LCCVB's motion for reconsideration. On June 7, 2006, LCCVB filed a second motion for reconsideration, asking the Court to reconsider its May 15, 2006, order denying LCCVB's motion for reconsideration of the summary judgment order. On September 22, 2006, the Court granted in part and denied in part LCCVB's second motion for reconsideration. The Court found that a genuine issue of material fact existed as to whether Ms. Janky granted LCCVB an implied non-exclusive license to a revised, copyrighted song, which was used in a video demo performance by the musical group Stormy

Weather for inclusion in a 12-minute video used by LCCVB, and as to the scope of that license.

On March 12, 2007, jury trial in this matter commenced. On March 16, 2007, the parties concluded their presentation of evidence and rested. On March 16, 2007, the jury returned a verdict in favor of Ms. Janky for $100,000. On March 19, 2007, the Clerk of the Court entered Judgment in favor of Ms. Janky and against LCCVB in the amount of $100,000 with interest at the rate of 4.93%.

LEGAL STANDARD

LCCVB brings its Motion for Remittitur or in the Alternative New Trial on Damages pursuant to Federal Rule of Civil Procedure 59. Where an award is not rationally connected to the evidence, Rule 59 allows the district court to (1) order a remittitur, if the plaintiff is willing to accept the remedy, or (2) order a new trial limited to evidence on damages, if the plaintiff will not accept a remittitur. *See Int'l Fin. Serv. Corp. v. Chromas Technologies Can., Inc.*, 356 F.3d 731, 739 (7th Cir. 2004) (citing *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1556 (7th Cir. 1990)). Fixing an award is a fact-finding exercise, thus only those awards that are "monstrously excessive," and the result of passion or prejudice, or not rationally related to the evidence presented at trial may be altered. *See Pincus*, 893 F.2d at 1554 (citing *Matter of Innovative Const. Sys., Inc.*, 793 F.2d 875, 887-88 (7th Cir. 1986).

Rule 59(a)(1) permits the district court to grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a)(1). In

considering a motion for a new trial, the trial court must view the evidence in the light most favorable to the prevailing party and issues of credibility and weight of the evidence are within the purview of the jury. *See Carter v. Chi. Police Officers,* 165 F.3d 1071, 1079 (7th Cir. 1998). Whether to grant a Rule 59(a) motion is within the trial court's broad discretion. *See Harvey v. Office of Banks & Real Estate,* 377 F.3d 698, 707 (7th Cir. 2004). The Seventh Circuit thus reviews a trial court's ruling on a motion for new trial for an abuse of discretion, which occurs only when no reasonable person could agree with the trial court. *See ABM Marking, Inc. v. Zanasi Fratelli, S.R.L.*, 353 F.3d 541, 543 (7th Cir. 2003).

ANALYSIS

LCCVB moves pursuant to Federal Rule of Civil Procedure 59 for remittitur or in the alternative a new trial on damages. In support of its Motion, LCCVB alleges that the damages awarded by the jury were in excess of what the pretrial order, jury instructions, and evidence at trial allowed for because Ms. Janky failed to mitigate her losses. Ms. Janky does not agree to remittitur and argues that mitigation was an issue decided by the jury, which should not be disturbed because the jury's verdict is supported by the evidence introduced at trial. Ms. Janky also requests that the Court award her attorneys' fees of $2,200.00 pursuant to 17 U.S.C. § 505 for expenses incurred in responding to LCCVB's Motion.

The standard used to judge mitigation is whether the person in question acted with reasonable care to minimize his or her damages. *See Hanna v. Am. Motors Corp.*, 724 F.2d 1300, 1306 (7th Cir. 1984).

Mitigation is a question of fact within the jury's discretion. *See Smith v. Great Am. Rest., Inc.*, 969 F.2d 430, 438 (7th Cir. 1992). Juries are presumed to follow instructions such as a mitigation instruction. *See U.S. v. Serpico*, 320 F.3d 691, 696 (7th Cir. 2003) (finding that jury is presumed to follow instruction to separate evidence presented against each defendant individually when defendants are tried in non-bifurcated trial); *Wilson v. Sundstrand Corp.*, No. 99C6944, 2003 WL 21878738, *1 (N.D. Ill. Aug. 8, 2003) (finding that juries in civil and criminal cases are presumed to follow instructions even when they are told to separate issues much more difficult than liability vs. damages).

To establish its claim that Ms. Janky failed to mitigate her damages, LCCVB relies on a stipulated fact in the Pretrial Order, Ms. Janky's trial testimony, and the Court's Final Jury Instructions. Stipulated fact 13 of the Pretrial Order states, "Cheryl Janky knew by at least 2001 that the song *Lake County, Indiana*, as used by Lake County Convention & Visitors Bureau was the same song or otherwise a derivative of the song '*Wonders of Indiana*' but took no action until June of 2003."

LCCVB points to the following portion of Ms. Janky's trial testimony, which LCCVB contends establishes that Ms. Janky knew of LCCVB's unauthorized use of *Lake County, Indiana* ("the song") in 1999:

> Q. [By Mr. Jordan.] At the grand opening, [on December 1, 1999] did you approach anyone from Lake County and express any concerns

about the song that you had just sung, Lake County, Indiana?

A. I did. I know that I didn't know Speros [Batistatos] very well, but I did try and approach him. He was running around like crazy like he said. But I wanted to make mention that the credits on that video, stated as Stormy Weather, and tried to get his attention. But he was very busy.

Q. I appreciate the answer. It wasn't to my question. I'm trying to find out if you approached anyone at Lake County Convention & Visitors Bureau at the grand opening with respect to the song entitled Lake County, Indiana that you just testified that you indeed performed live with the group?

A. No. I was under the impression they were trying it to see how the public would like it. There was no reason to.

* * *

Q. And you say you've tried to approach someone regarding the video. But never actually spoke to anyone, correct?

A. I tried to speak to Speros, but he was very busy, yes.

Q. And you spoke to no one else, correct?

A. No. (Unmark)

* * *

Q. And after December came and went, when you were unable to apparently find Mr. Batistatos, you didn't make any effort to contact him at any subsequent date, did you, regarding concerns over the video?

A. I was under the impression that they weren't taking the song. So, no, I did not.

* * *

Q. [By Mr. Nabwangu] So he never said anything about the credit issue?

A. The conversation was not two way because it was too busy. That's why I said I had said – tried to say something.

Q. You said something. What did you say?

A. I said the credits were wrong on the video and it says written by Stormy Weather.

Q. Did he address that issue about the credits being wrong on the video?

A. No he didn't.

Q. At any time thereafter did he address the issue about the credits being wrong on the video?

A. No.

Q. What else did he say to you after you said the credits are wrong?

A. It was not a response. It was helter-skelter and running away.

* * *

Q. Previously my apologies for jumping a little bit. You testified that you never ended up having a conversation with Mr. Batistatos on December 1, 1999 and it remains your position and your testimony that you've never attempted to follow-up with Mr. Batistatos after December 1st, correct?

A. No.

Q. No I'm wrong?

A. No. I did not follow-up.

Trial Tr. 86-87, 89, 152-53, 163, 166, Mar. 14, 2007. LCCVB also relies on Final Jury Instruction # 26, which as submitted to the Jury states:

The Plaintiff Cheryl Janky must use reasonable care to minimize her damages. This is called mitigation of damages.

The Plaintiff Cheryl Janky may not recover for any item of damage which she could have avoided through the use of reasonable care.

The Defendant Lake County Convention & Visitors Bureau has the burden of proving by a

preponderance of the evidence that Cheryl Janky failed to use reasonable care to minimize her damages.

Final Jury Instruction # 25, provided that the jury could award "only such damages as will reasonably compensate [Ms. Janky] for such injury and damage as you find, from a preponderance of the evidence in the case, that she has sustained as a proximate result of infringement."

Examining the trial testimony, Ms. Janky testified that she filed a copyright application for the song sometime before May 1999. Ms. Janky testified that by the Summer of 1999, she assumed that LCCVB did not want to use the song. Ms. Janky recalled that a video including the song was played in December 1999 by LCCVB at the grand opening of its new facility. Ms. Janky explained that she thought the video was played in order to gauge public reaction of its appeal. Ms. Janky testified that she was never contacted or advised that her song was chosen to be used by LCCVB or that it would be marketed or sold.

After December 1, 1999, Ms. Janky testified that she became aware of a dispute between Stormy Weather group members George Carl and Henry Farag regarding the licensing of the song and use of the song by LCCVB. Ms. Janky informed Mr. Farag and Mr. Carl that she had a copyright to the song, that it belonged to her, and that nobody could sell it. Ms. Janky explained that based on a discussion she had with Henry Farag sometime after December 1999, she understood that LCCVB did not want the song. Ms. Janky testified that any subsequent business dealings that occurred between Mr. Farag and LCCVB with

regard to the song were carried out without her knowledge.

Ms. Janky recalled that the next time she heard the song used by LCCVB was in 2001 when she attempted to make a phone call to LCCVB and was put on hold. Apparently the song played as background music for callers placed on hold. Ms. Janky testified that she next heard about the song in 2002 when she received a letter regarding the use of the song. Questioning regarding this letter was limited at trial. However, Ms. Janky stated that after receiving the letter and hearing the song while put on hold, she contacted an attorney in early 2003 with regard to LCCVB's use of the song.

In its memorandum in support of its Motion, LCCVB essentially argues that a person fails to mitigate his or her damages if he or she knows of an infringement and does not act to stop it. This standard is incorrect. Rather, the proper standard for mitigation is whether the person acted with reasonable care. *See Hanna*, 724 F.2d 1306.

In analyzing LCCVB's Motion, the Court is to consider the evidence in the light most favorable to the prevailing party. *See Carter*, 165 F.3d at 1079. Considering the jury's verdict, both parties agree that the jury awarded Ms. Janky $100,000 based on a calculation of three years of copyright infringement by LCCVB. The parties suggest that the jury relied on the testimony of Cheryl Janky and Speros Batistatos and affixed $30,000 as the annual value of the infringement. LCCVB proposes that the jury awarded an additional $10,000 in interest.

Pertaining to mitigation of damages, Ms. Janky testified that she considered LCCVB's December 1999 use of a video including the song to be a test of public reaction to the song. She testified that fellow members of the group Stormy Weather informed her that LCCVB did not wish to use the song. She further stated that she did not fully realize the scope of LCCVB's unauthorized use of the song until 2002. She testified that in 2003, she contacted an attorney with regard to LCCVB's unauthorized use of the song.

As the finder of fact, it was within the jury's discretion to either rely on or disregard Ms. Janky's statements. If relied on, each of Ms. Janky's statements supports a finding that Ms. Janky acted with reasonable care to mitigate her losses. Therefore, the Court finds that the jury's judgment of $100,000 in favor of Ms. Janky, when construed in the light most favorable to the prevailing party, was rationally connected to the evidence and should be upheld.

In her response, Ms. Janky requests that the Court award her attorneys' fees pursuant to 17 U.S.C. § 505 for costs incurred in responding to the instant Motion. Currently, Plaintiff Janky's Motion for Attorneys Fees and Costs Under 17 U.S.C. § 505; Request for Prejudgment Interest is pending before the Court. In the interest of judicial economy, the Court will handle all fees requested pursuant to 17 U.S.C. § 505 in the same order. Therefore, the Court requests that Ms. Janky file a supplement to the aforementioned 17 U.S.C. § 505 motion for fees including an itemized list of the fees requested in connection with responding to the instant Motion. LCCVB may respond to the supplement in the time provided by Local Rule 7.1. Thereafter, the Court will issue a single order with

regard to all the fees requested by Ms. Janky pursuant to 17 U.S.C. § 505.

CONCLUSION

For the foregoing reasons, the Court finds that LCCVB has not met the standard set forth in Federal Rule of Civil Procedure 59 to warrant granting a new trial in this matter. In addition, the Court finds that remittitur is not appropriate. Accordingly, the Court **DENIES** Defendant Lake County Convention & Visitors Bureau's FRCP 59 Motion for Remittitur or in Alternative New Trial on Damages [DE 247].

SO ORDERED this 16th day of May, 2007.

s/ Paul R. Cherry
MAGISTRATE JUDGE PAUL R. CHERRY
UNITED STATES DISTRICT COURT

cc: All counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CAUSE NO.: 3:05-CV-217-PRC

[Filed April 24, 2007]

CHERYL JANKY,	)
Plaintiff,	)
	)
v.	)
	)
LAKE COUNTY CONVENTION & VISITORS BUREAU,	)
Defendant.	)
	)

ORDER

This matter is before the Court on a Motion to Alter or Amend Judgment to Set Off Sanctions From Final Judgment [DE 242], filed by Defendant Lake County Convention & Visitors Bureau ("LCCVB") on March 22, 2007. LCCVB requests that the sanctions this Court entered on June 16, 2006, and November 3, 2006, be setoff against the March 19, 2007, judgment entered in favor of Plaintiff Cheryl Janky. On March 30, 2007, Ms. Janky filed a response to the Motion to Alter or Amend. On April 4, 2007, LCCVB filed a reply in support of its Motion to Alter or Amend. For the

following reasons, the Court now grants in part and denies in part the Motion to Alter or Amend.

PROCEDURAL BACKGROUND

The Court granted two motions for sanctions in favor of LCCVB in this matter. On June 6, 2006, LCCVB filed a motion for Rule 37(c) sanctions. In the motion, LCCVB requested that the Court sanction Ms. Janky for continuing to assert that jurisdiction properly existed in a Michigan court of law after it became clear through discovery that there was no basis for jurisdiction in Michigan. LCCVB requested reimbursement for all costs and fees associated with litigating the jurisdiction issue.

On June 8, 2006, Ms. Janky filed a response to the motion for Rule 37(c) sanctions. Ms. Janky argued that sanctions were not appropriate because the Michigan court, before which the case was originally filed, found that it had jurisdiction and entertained the discovery and motions for which LCCVB sought sanctions. Ms. Janky asserted that her discovery and motion practice proceeded with the consent of the court, and it should not be sanctioned. On June 12, 2006, LCCVB filed a reply.

On June 16, 2006, the Court entered an order granting in part and denying in part LCCVB's motion for Rule 37(c) sanctions. The Court found that at some point in the litigation it became clear that LCCVB did not conduct business in Michigan and thus would not be subject to personal jurisdiction in that state. Therefore the Court ordered Ms. Janky to pay the reasonable expenses incurred by LCCVB in proving that jurisdiction did not exist in the Michigan court

after the issue became clear. On June 23, 2006, LCCVB submitted a bill of costs for $12,130.13 it incurred in litigating the issue of whether personal jurisdiction existed in Michigan after the point in time when the jurisdictional issue became clear so the Court granted the motion to the extent of imposing a sanction in the amount of $12,130.13.

On September 21, 2006, LCCVB filed a motion for Rule 11 sanctions. In the motion, LCCVB requested that the Court sanction Ms. Janky for having filed a June 8, 2006, "Motion for Impoundment and Injunctive Relief for Defendants' Continued Conduct in Violation of Court's March 29, 2006 Order and Copyright Act" against LCCVB because it was unsupported by factual basis and legal theory.

On October 9, 2006, Ms. Janky filed her response to the motion for Rule 11 sanctions. Ms. Janky argued that LCCVB's request for Rule 11 sanctions was moot and barred by the Court's September 22, 2006, Order denying LCCVB's request for sanctions. Ms. Janky also requested that the Court strike LCCVB's Motion for Rule 11 Sanctions pursuant to Federal Rule of Civil Procedure 12(f). LCCVB filed a reply on October 16, 2006.

On November 3, 2006, the Court entered an order granting LCCVB's motion for Rule 11 sanctions. The Court found that Ms. Janky's motion for impoundment was unsupported and that monetary sanctions in favor of LCCVB would be an effective deterrence against filing unsupported motions in the future. The Court ruled that there was no evidence that Ms. Janky herself was involved in filing the motion for impoundment and thus ordered that Ms. Janky's

counsel, Gregory Reed, pay a $2,500 sanction to LCCVB.

On March 12, 2007, jury trial commenced. On March 16, 2007, the parties concluded their presentation of evidence and rested. On March 16, 2007, the jury returned a verdict in favor of Ms. Janky for $100,000. On March 19, 2007, the Clerk of the Court entered Judgment in favor of Ms. Janky and against LCCVB in the amount of $100,000 with interest at the rate of 4.93%.

ANALYSIS

In the instant Motion, LCCVB requests that the Court subtract the $14,630.13 in previously awarded sanctions plus interest accrued to date from the $100,000 judgment. LCCVB states that the sanctions and the judgment are debts in the same matter involving the same parties and as a result, the sanctions should be subtracted from the judgment to arrive at a single amount owed. Ms. Janky responds by arguing that the Court should not grant a setoff because LCCVB did not seek concurrence in the matter. Ms. Janky does not cite any law in support of this proposition and does not provide the Court with any further explanation of why concurrence is necessary. In the closing paragraph of her response, Ms. Janky asks the Court "not to set aside Plaintiff's $100,000 by $2,500 of the $14,603.13." Therefore, Ms. Janky seemingly acquiesces to a setoff of $12,103.13 from the judgment.

"Setoffs are permitted only when the debts are 'mutual.'" *Soo Line R.R. Co. v. Escanaba & Lake Superior R.R. Co.*, 840 F.2d 546, 551 (7th Cir. 1988).

"Debts arising at different times out of different circumstances are not mutual." *Id.* Explained differently, in order to have a setoff, "there must be a mutuality of obligation, i. e., the debts must be owing between the same persons and in the same right." *Jewett v. Martinsville Milling Co.*, 76 F.2d 153, 153 (7th Cir. 1935).

Here, the June 16, 2006, sanctions against Ms. Janky and the judgment entered on March 19, 2007, arose from the same litigation and are owed between the same two parties. The sanctions against Ms. Janky for continuing to assert jurisdiction in a Michigan court after there was no longer a basis to assert jurisdiction were awarded in favor of LCCVB. The $100,000 judgment in favor of Ms. Janky is owed by LCCVB. Both debts arise from the same facts underlying this cause of action. Based on the common identity of facts and parties, the Court finds that the debts owed are mutual and should therefore be setoff against one another.

The $12,130.13 in sanctions awarded to LCCVB accrued interest beginning on January 12, 2007, the date the Court issued an order quantifying the sanctions. The rate of interest is calculated "at a rate equal to the weekly average of 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961(a). Interest is to be computed daily to the date of payment and compounded annually. *See* 28 U.S.C. § 1961(b). Here, the applicable interest rate from the week of January 5, 2007, is 4.98%. *See* Federal Reserve Statistical Release, Selected Interest Rates, Historical Data, January 5, 2007.

In her response, Ms. Janky further argues that the court should not impose $2,500 of the $14,630.13 in sanctions previously awarded to LCCVB because new evidence revealed at trial undermines the original basis for awarding the $2,500 sanction. Ms. Janky makes this request pursuant to Rule 60(b), which allows relief from judgment or order due to mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. *See* Fed. R. Civ. P. 60(b). Rule 60(b) states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

Fed R. Civ. P. 60(b).

Ms. Janky's request to disallow $2,500 in sanctions is essentially a separate motion filed under Rule 60(b). It is not a response to LCCVB's Motion to Alter or Amend, which was filed pursuant to Rule 60(a). Local Rule 7.1 states "[e]ach motion shall be separate." N.D. Ind. L.R. 7.1(b). Thus, Ms. Janky cannot bring a separate Rule 60(b) motion to disallow a previous court ordered sanction in her response to LCCVB's motion.

Moreover, to properly bring a Rule 60(b) motion, the newly discovered evidence could not by due diligence have been discovered in time to move for a new trial under Rule 59(b). *See* Fed. R. Civ. P. 60(b). Rule 59(b) states, "[a]ny motion for a new trial shall be filed no later than 10 days after entry of the

judgment." Fed. R. Civ. P. 59(b). Here, the new evidence was discovered during trial. Therefore, a Rule 60(b) motion is not proper. Ms. Janky could have filed a motion under Rule 59(b) to amend a prior judgment based on newly discovered evidence but the time to do so has expired. The Court declines to rule on the issue of whether the $2,500 sanction is appropriate as it is not properly before the Court.

Despite the procedural improprieties contained in Ms. Janky's response, the Court finds that the $2,500 sanction should not be set off from the $100,000 judgment because there is not a mutuality of parties. The $2,500 sanction is owed by Ms. Janky's attorney Gregory Reed to LCCVB but the $100,000 judgment is owed by LCCVB to Ms. Janky herself. As a result, the $2,500 sanction cannot be set off from the judgment.

CONCLUSION

Based upon the foregoing, the Court hereby **GRANTS IN PART AND DENIES IN PART** the Motion to Alter or Amend Judgment to Set Off Sanctions From Final Judgment [DE 242]. The Court **ORDERS** that $12,130.13, plus interest which began to accrue on January 12, 2007 and continues until the date of payment, be set off from the $100,000 judgment. The Court further **ORDERS** that interest is to be computed daily and compounded annually at a rate of 4.98%. The $2,500 sanction awarded to LCCVB by the Court on November 3, 2006, against Attorney Gregory Reed remains outstanding and is not set off.

So ORDERED this 24th day of April, 2007.

s/ Paul R. Cherry
MAGISTRATE JUDGE PAUL R. CHERRY
UNITED STATES DISTRICT COURT

cc: All counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CAUSE NO.: 3:05-CV-217-PRC

[Filed March 29, 2006]

CHERYL JANKY,	)
	)
Plaintiff,	)
	)
v.	)
	)
HENRY FARAG, STREET GOLD RECORDS, LAKE COUNTY CONVENTION & VISITORS BUREAU, Jointly and Severally,	)
	)
Defendants.	)
	)

ORDER

This matter is before the Court on (1) Defendant Lake County Convention & Visitors Bureau's Motion for Summary Judgment [DE 29], filed by Defendant Lake County Convention & Visitors Bureau ("LCCVB") on July 21, 2005; (2) Plaintiff Cheryl Janky's Motion for Summary Judgment [DE 63], filed by the Plaintiff, Cheryl Janky, on November 9, 2005; and (3) Plaintiff

Cheryl Janky's Request to Schedule Oral Argument on Plaintiff's Motion for Summary Judgment [DE 65], filed by Ms. Janky on November 9, 2005. For the reasons set forth in the body of this Order, the Court grants in part and denies in part Defendant LCCVB's Motion for Summary Judgment and grants in part, denies in part, and denies in part as moot Plaintiff Cheryl Janky's Motion for Summary Judgment.

PROCEDURAL BACKGROUND

On October 3, 2003, Cheryl Janky filed a Complaint against Henry Farag, Street Gold Records, and LCCVB in the United States District Court for the Eastern District of Michigan. LCCVB filed an Answer on December 8, 2003, and Henry Farag filed an Answer and Counterclaim on January 7, 2004. On January 8, 2004, LCCVB filed an Amended Answer. Ms. Janky filed an Answer to the Counterclaim on February 6, 2004.

On January 16, 2004, Ms. Janky filed a Motion for Summary Judgment in the Eastern District of Michigan. On March 31, 2005, this matter was transferred to the Northern District of Indiana, South Bend Division, pursuant to 28 U.S.C. § 1631. This matter was then transferred to the Hammond Division on June 14, 2005. Ms. Janky's January 16, 2004 Motion for Summary Judgment and all responsive briefing were stricken by District Court Judge James Moody on June 20, 2005.

LCCVB filed its Motion for Summary Judgment in the Northern District of Indiana on July 21, 2005. That same day, the Court held a telephonic scheduling conference and set the deadline for the amendment of

pleadings by Ms. Janky for August 1, 2005, and by the Defendants for August 31, 2005. The discovery deadline was set for October 28, 2005, and the dispositive motion deadline was set for November 10, 2005.

On July 28, 2005, the Court entered an Order staying the proceedings against Henry Farag pursuant to an automatic stay in bankruptcy. Later, on October 19, 2005, the Court reaffirmed the stay against Henry Farag and also stayed the matter against Street Gold Records, a sole proprietorship. Ms. Janky has made the Court aware that Mr. Farag received a discharge from the bankruptcy court on December 5, 2005.

On August 10, 2005, Ms. Janky filed an Amended Complaint, to which LCCVB filed an objection on August 15, 2005. On September 9, 2005, Ms. Janky filed a Motion for Leave to File Amended Complaint and a Rule 56 Motion to Strike LCCVB's Motion for Summary Judgment. On September 19, 2005, LCCVB filed a response to both motions. On September 12, 2005, the Court ordered that the August 10, 2005 Amended Complaint be stricken from the record, and on October 3, 2005, the Court granted the Motion for Leave to Amend Complaint for the sole purpose of correctly identifying Street Gold Records as a sole proprietorship.

On October 5, 2005, Ms. Janky filed an Amended Complaint for copyright infringement, unfair competition, unjust enrichment, negligence, misappropriation, and an accounting of royalties. LCCVB filed an Answer on October 10, 2005.

On October 19, 2005, the parties consented to have this case assigned to a United States Magistrate Judge to conduct all further proceedings and to order the entry of a final judgment in this case. Thus, this Court has jurisdiction to decide this case pursuant to 28 U.S.C. § 636(c).

On October 21, 2005, Ms. Janky filed a Motion for Leave to File a Second Amended Complaint and a Motion for Extension of Time to File a Response to LCCVB's Motion for Summary Judgment. Without leave of Court, she filed the Response in Opposition to the Motion for Summary Judgment that same day. On October 26, 2005, LCCVB filed a response in opposition to both of Ms. Janky's motions. On December 1, 2005, the Court denied the Motion for Leave to File Second Amended Complaint.

On October 27, 2005, the Court held a hearing during which the Court denied the Motion to Strike the Motion for Summary Judgment, denied the Motion for Extension of Time to File a Response to LCCVB's Motion for Summary Judgment, ordered that the Response to the Motion for Summary Judgment be stricken, and granted a Motion Requesting Ruling on Motion for Summary Judgment, which had been filed on September 1, 2005, by LCCVB.

On November 8, 2005, LCCVB filed a Motion to Dismiss for Lack of Prosecution. Ms. Janky filed a Response on November 23, 2005, and LCCVB filed a Reply on November 30, 2005. This motion remains pending before the Court.

On November 9, 2005, Ms. Janky filed a Motion for Summary Judgment and a Motion for Oral Argument

on Motion for Summary Judgment. LCCVB filed a response to the Motion for Summary Judgment on December 6, 2005, and a response to the Motion for Hearing on November 14, 2005. Ms. Janky filed a Reply in support of her Motion for Summary Judgment on December 23, 2005.

On December 30, 2005, Ms. Janky filed a Motion to Dismiss Counterclaim pursuant to Fed. R. Civ. P. 12(b)(6) and Alternatively Fed. R. Civ. P. 41(b). LCCVB filed a Response on January 5, 2006, and Ms. Janky filed a reply on January 12, 2006. On January 17, 2006, Mr. Farag filed a Response, and on January 18, 2006, Ms. Janky filed a reply. This motion remains pending before the Court.

On February 17, 2006, LCCVB filed a Motion to Compel Mediation to which Ms. Janky filed a response in opposition on March 1, 2006. Having held a motion hearing on March 3, 2006 on the Motion to Compel Mediation and having heard the arguments of the parties, the Court denied the motion.

SUMMARY JUDGMENT STANDARD

The Federal Rules of Civil Procedure mandate that motions for summary judgment be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c) further requires the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that

party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[S]ummary judgment is appropriate–in fact, is mandated–where there are no disputed issues of material fact and the movant must prevail as a matter of law. In other words, the record must reveal that no reasonable jury could find for the non-moving party." *Dempsey v. Atchison, Topeka, & Santa Fe Ry. Co.*, 16 F.3d 832, 836 (7th Cir. 1994) (citations and quotation marks omitted).

A party seeking summary judgment bears the initial responsibility of informing a court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party may discharge its "initial responsibility" by simply "'showing'–that is, pointing out to the district court–that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. When the non-moving party would have the burden of proof at trial, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* at 323, 325; *Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 201 n.3 (7th Cir. 1994); *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990). However, the moving party, if it chooses, may support its motion for summary judgment with affidavits or other materials and thereby shift to the non-moving party the burden of showing that an issue of material fact exists. *Kaszuk v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 791 F.2d 548, 558 (7th Cir.

1986); *Bowers v. DeVito*, 686 F.2d 616, 617 (7th Cir. 1982).

Once a properly supported motion for summary judgment is made, the non-moving party cannot resist the motion and withstand summary judgment by merely resting on its pleadings. Fed. R. Civ. P. 56(e); *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994). Rule 56(e) establishes that "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). Thus, to demonstrate a genuine issue of fact, the non-moving party must do more than raise some metaphysical doubt as to the material facts; the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences in favor of that party. *NLFC, Inc. v. Devcom Mid-Am., Inc.*, 45 F.3d 231, 234 (7th Cir. 1995); *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994). A court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Anderson*, 477 U.S. at 249-50; *Doe*, 42 F.3d at 443. When considering cross-motions for summary judgment, "our review of the record requires that we construe all inferences in favor of the party against whom the motion under

consideration is made." *Allen v. City of Chicago*, 351 F.3d 306, 311 (7th Cir. 2003) (citations and internal quotation marks omitted).[1]

MATERIAL FACTS

Cheryl Janky and Henry Farag were members of Stormy Weather, a musical group. At rehearsal one evening, Mr. Farag made an announcement that LCCVB was looking for a song to represent Lake County. No formal rules or parameters for the contents of the song were provided to the group. As a result of that announcement, Ms. Janky wrote the music and lyrics of the song "Wonders of Indiana" a/k/a "Indiana," and on May 6, 1999, without the assistance of counsel, Ms. Janky obtained a copyright for the musical work titled "Wonders of Indiana," (Pau2-397-856), indicating that she was the author.

Subsequently, Henry Farag offered his ideas and suggestions for revising the lyrics of "Wonders of Indiana" in order to comply with LCCVB's requirements. Ms. Janky incorporated the suggestions, which she states constitute a 10% revision of the song's lyrics. Ms. Janky prepared a new

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[1] LCCVB's Motion for Summary Judgment is unopposed as the Court struck Ms. Janky's response as untimely. However, LCCVB filed its Motion for Summary Judgment months prior to the dispositive motion deadline, and Ms. Janky filed her Motion for Summary Judgment prior to the dispositive motion deadline and before the Court had ruled on LCCVB's Motion for Summary Judgment. Although the Court granted LCCVB's Motion Requesting Ruling on Motion for Summary Judgment, as the Court now has both motions before it for consideration, the Court will consider them as cross motions for summary judgment.

copyright registration form for the revised song and signed both her and Mr. Farag's name on the form. On December 16, 1999, Ms. Janky obtained a copyright (Pau2-485-026) for the revised song, "Indiana (Wonders of)," again without the assistance of counsel. On the copyright certificate of registration, Ms. Janky gave herself credit for the music and lyrics and gave Mr. Farag credit for 10% of the lyrics, noting "additional lyrics/(joint work)." Def. Br., Exh. A; Pl. Br, Exh. A-2. Both Ms. Janky and Mr. Farag are listed on the copyright certificate of registration as copyright claimants. Ms. Janky further indicated on the form that the material added to the work was "additional lyrics to be used in [ ] with original lyrics." *Id.* On an ASCAP application, she gave Mr. Farag ten percent credit.

In a November 9, 2005 Declaration, Ms. Janky states that her intent in including Mr. Farag on the December 16, 1999 copyright registration for the revised song was to indicate her gratitude, to designate credit for the ideas, and to demonstrate that she "appreciated every little bit of support, which is hard to obtain in this industry." Pl. Br.., Exh. E-2, ¶ 6. She explains, "I now understand that the proper way to give a 'thank you' for any de minimis contribution is to give acknowledgment on the album credits and/or liner notes." *Id.* Ms. Janky further states, "I never intended for Mr. Farag to acquire any copyright ownership interest in the song 'Wonders of Indiana' a/k/a 'Indiana' and I did not consider him to be a co-author of the song. Mr. Farag was not present when I originally created the song in early 1999. I created the music for the song 100% on my own. Mr. Farag's contributions to the song were minor and are limited to few suggestions." *Id.*, ¶ 7. She represents

that Mr. Farag and she never discussed his intent or desire to share ownership of the song.

Mr. Farag never requested that she include his name on the copyright registration form and claims in his Counterclaim that her act of affixing his name to the copyright registration form has harmed his reputation. He asserts that the registration is a fraudulent document. Mr. Farag has not filed a copyright registration of his own asserting his contribution to the lyrical composition of the revised song.

On July 15, 2003, Ms. Janky, without assistance of counsel, submitted a third copyright registration for the work "Indiana (Wonders of)," listing a "contents title" of "Lake County." She identified only herself as the author of the music, lyrics, and "arrangement performance." Pl. Mem., Exh. A-3. On the registration, she acknowledged the May 1999 registration (Pau 2-397-856) as the previous registration, and then indicated that the derivative work was a sound recording based on the Pau 2-397-856 registration.

Street Gold Records released the revised song on the "Doo-It Doo-Wop" album, performed by Stormy Weather, of which both Mr. Farag and Ms. Janky were members. The CD has a copyright of 2000 and lists Ms. Janky and Mr. Farag as authors of the revised song and Farag Music BMI as the publisher of the revised song. There is no evidence in the record regarding whether a copyright registration was filed or approved for the "Doo-It Doo-Wop" album that contained the performance of the revised song or for the performance of the revised song individually.

The group Stormy Weather also recorded a video, which included the song *Lake County, Indiana*. Mr. Farag produced the video. LCCVB paid for the video and advertised the group in exchange for a non-exclusive license to use the revised song, granted by Mr. Farag to LCCVB. There are no written agreements between Ms. Janky and Mr. Farag or Street Gold Records regarding the playing or performing of the video.

Ms. Janky states in her January 16, 2004 Declaration that the revised song is also a part of an audio soundtrack used for a twelve-minute video for LCCVB that was being shown at the Welcome Center as well as used on their phone lines as the background music for customers put on hold. LCCVB also sold copies of the album "Doo-It Doo-Wop" at the Welcome Center. LCCVB states in its Answer that the revised song no longer appears as part of the audio/video soundtrack being shown at the Welcome Center and is not currently being used as background music for customers placed on hold.

Mr. Farag is the sole owner of Street Gold Records, a sole proprietorship. He states in his declaration that Street Gold Records was responsible for producing, manufacturing, and marketing the albums recorded by Stormy Weather.

Mr. Farag further states that as owner and/or co-owner of the revised song, he issued a non-exclusive license to LCCVB to play the song in question at the Welcome Center, at functions, in promotional ads, and to individuals who called the Welcome Center and were placed on hold.

He also explains that Farag Music BMI is the publisher of original material created and performed by Stormy Weather and may issue non-exclusive licenses regarding the playing of these works and that Street Gold Records/Farag Music BMI, as the label and publisher of the "Doo It Doo-Wop" album, has the contractual authority to issue non-exclusive licenses for the performance of works recorded by Stormy Weather, including, but not limited to the revised song. Finally, Mr. Farag states that Street Gold Records/Farag Music BMI, as the label and publisher of "Doo-It Doo-Wop," indeed granted a non-exclusive license to LCCVB to allow the performing of the revised song.

In her 2004 Declaration, Ms. Janky states that Mr. Farag, through his company Street Gold Records, licensed and sold the rights to the revised song to LCCVB without her knowledge, approval, or consent. She further states, "I notified Lake County Convention and Visitors Bureau and Mr. Farag of their unauthorized usage and violation of my copyrights and they refused to cease their infringement of my copyrights." Def. Br., Exh. 1; Pl. Br., Exh. E-1, ¶ 9.

Ms. Janky states that she has not received any money from LCCVB or from Mr. Farag.

In a sworn declaration, James Tsismanakis, the current President/CEO of LCCVB, states that LCCVB is a political subdivision as defined in Indiana Code § 34-6-2-110, and, therefore, is a governmental entity as defined in Indiana Code § 34-6-2-49 subject to the protections of the Indiana Tort Claims Act.

ANALYSIS

In her Amended Complaint, Ms. Janky alleges that she has a valid copyright in the musical composition "Wonders of Indiana," that Ms. Janky and Mr. Farag did not intend for "Wonders of Indiana" a/k/a "Indiana" to be a joint work, that Ms. Janky composed 100% of the music for the musical composition "Wonders of Indiana," that Ms. Janky composed 90% of the lyrics to the musical composition "Wonders of Indiana," that Mr. Farag made a 10% de minimis contribution to the lyrics, and that LCCVB publicly used, performed, copied, distributed, and sold copies of "Wonders of Indiana" a/k/a "Indiana" without Ms. Janky's authorization as well as without compensating Ms. Janky. Ms. Janky alleges federal copyright infringement as well as various state common law causes of action.

On all of Ms. Janky's claims, LCCVB seeks summary judgment under the Indiana Tort Claims Act on the basis that Ms. Janky did not serve LCCVB within 180 days of the alleged infringement. LCCVB also seeks summary judgment on the claim of copyright infringement based on the theory that Defendant Henry Farag was a joint owner with Ms. Janky of the revised song used by LCCVB, that Mr. Farag issued a non-exclusive license to the LCCVB to use the revised song in certain contexts, that Mr. Farag had distribution rights to the revised song, and that Farag gave LCCVB permission to use the revised song.[2]

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[2] In a footnote to its Brief in Support of Motion for Summary Judgment, LCCVB states that it contends that the revised song

In her Motion for Summary Judgment, Ms. Janky seeks a ruling from the Court that she has a valid copyright in the revised song, that Mr. Farag was not a joint owner of the revised song, and that LCCVB infringed her copyright. Ms. Janky argues that the revised song is not a joint work because she and Mr. Farag did not intend to be joint authors, and, therefore, Mr. Farag did not have the authority to grant a non-exclusive license to LCCVB for use of the revised song. In addition, Ms. Janky argues in response to LCCVB's affirmative defense that the ITCA is inapplicable to the federal copyright claims.

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was created as a work for hire for LCCVB. Def. Mem., p. 1. LCCVB goes on to submit that, "If so determined, [LCCVB] would own copyright to the song and, therefore, could not be charged with copyright infringement." However, at no time in the body of its brief or in its response to Ms. Janky's Motion for Summary Judgment does LCCVB assert that the song was a work for hire, offer any facts supported by evidence that the song was a work for hire, set forth the legal standard for a work for hire, or offer any analysis as to why the song is a work for hire. More importantly, LCCVB devotes its Motion for Summary Judgment and its response to Ms. Janky's motion to arguing that Mr. Farag was a joint author of the song, as evidenced by the December 1999 copyright registration, and thus had the authority to grant LCCVB a license to use the song. At no time does LCCVB contend that Ms. Janky does not also hold a copyright in the revised song, nor could it as it asserts that Mr. Farag was a joint author with Ms. Janky. LCCVB cannot maintain the inconsistent positions that on the one hand the song was a work for hire, which would give LCCVB sole ownership of the copyright to the song, and on the other that Mr. Farag and Ms. Janky are joint authors of the song with ownership of the copyright. *See* 17 U.S.C. § 201(b). Because LCCVB has not attempted to overcome the presumption of validity of the December 1999 copyright with any evidence that the song was a work for hire, the Court finds that LCCVB has waived its right to assert that the revised song was a work for hire.

A. Copyright Infringement

In order to prevail on a claim of copyright infringement, a plaintiff must prove ownership of a valid copyright, as well as the copying of constituent elements of the work that are original. *See Feist Pub'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). A certificate of registration constitutes "prima facie evidence of the validity of the copyright and of the facts stated in the certificate" in any judicial proceeding. 17 U.S.C. § 401(c); *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 207 (7th Cir. 1994).

1. Ownership of a Valid Copyright

In the instant matter, Ms. Janky holds a May 1999 copyright in her original song. However, the revised song, which she alleges LCCVB used without her permission but which LCCVB alleges it had a non-exclusive license to use from Mr. Farag, is the subject of a December 1999 copyright, on which both Ms. Janky and Mr. Farag's names appear.

In its Motion for Summary Judgment, LCCVB argues that Mr. Farag is a joint author of the entire revised song based on the December 1999 copyright registration, citing 17 U.S.C. § 410(c). This position is untenable since Mr. Farag asserts in his Counterclaim, filed in this case on January 7, 2004, that "Cheryl Janky has forged Henry Farag's signature on a copyright form" and this is a "fraudulent document."[3]

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[3] Paragraph 1 of Mr. Farag's Counterclaim provides:

Cheryl Janky has forged Henry Farag's signature on a

Accordingly, the December 1999 copyright registration is not prima facie evidence that Mr. Farag holds a valid copyright in the revised song.

In its Motion for Summary Judgment, LCCVB also argues that Mr. Farag is a joint owner of at least ten percent of the revised song based on Ms. Janky's Declaration that Mr. Farag revised ten percent of the lyrics and based on the ASCAP filing and copyright filing. In contrast, in her Motion for Summary Judgment, Ms. Janky asserts that she has a presumption of validity in her copyright of the revised song and that Mr. Farag is not a joint author.

Because Ms. Janky has a valid copyright registration made within the requisite five-year period (the December 1999 copyright), the burden is on LCCVB to show the invalidity of the copyright registration. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1065 (7th Cir. 1994). The invalidity of a copyright registration can be established by "demonstrat[ing] that the material was copied from another source or disput[ing] the authorship of the material itself." *Id.* In this case, LCCVB challenges the authorship of the revised song by alleging that Mr.

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copyright form that she submitted in exhibits of her pleadings, thereby harming Henry Farag's reputation. Cheryl Janky submitted this fraudulent document to the Federal Court and to the Library of Congress. Cheryl Janky has also sought copyrights on "Lake County, Indiana" without advising the co-writer, Henry Farag.

Farag Counterclaim, DE 4.

Farag is a joint author of the revised song[4] and, therefore, that Mr. Farag had the right to grant a license to LCCVB to play the song.

Pursuant to 17 U.S.C. § 201(a), "[t]he authors of a joint work are co-owners of the copyright in the work." "In a joint work, the joint authors hold undivided interests in a work, despite any differences in each author's contribution. Each author as a co-owner has a right to use or to license the use of the work, subject to an accounting to the other co-owners for any profits. Thus, even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys a significant benefit." *Erickson*, 13 F.3d at 1068 (internal citations omitted).

Accordingly, before an individual such as Mr. Farag can be afforded the benefits of joint ownership, there must be a finding of joint authorship. A "joint work" is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. The "statutory language clearly requires that each author intend that their respective contributions be merged into a unitary whole." *Erickson*, 13 F.3d at 1068-69. Contemporaneous input by more than one party alone does not satisfy the intent requirement. *Id.* at 1069.

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[4] Although LCCVB asserts in its Motion for Summary Judgment that Mr. Farag was a joint author of the revised song with Ms. Janky, at no time does LCCVB articulate the standard for joint authorship. In its response to Ms. Janky's Motion for Summary Judgment, LCCVB does not acknowledge or challenge Ms. Janky's articulation of the requirements of joint authorship.

Even if two individuals collaborate with the intent to create a unitary work, "the product will be considered a 'joint work' only if the collaborators can be considered 'authors.'" *Id.* In the *Erickson* case, the Seventh Circuit adopted the "copyrightability test" for authorship. *Id.* at 1071. This test requires that the contribution of each collaborator "represent[] original expression that could stand on its own as the subject matter of copyright" and that the parties "must have intended to be joint authors at the time the work was created." *Id.* at 1070 (citing Paul Goldstein, *Copyright: Principles, Law, and Practice* § 4.2.1.2, at 379 (1989)). The rationale behind the test stems from the definition of "joint work" in § 101 as a "work prepared by two or more *authors*," and the term "author" is further defined as "the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." *Id.* at 1071 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989)). Further, "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* (citing 17 U.S.C. § 101).

In summary, the Seventh Circuit has adopted a two-part test for joint authorship. First, the party asserting joint authorship "must show the parties intended to be joint authors at the time the work was created." *Id.* Second, the party "must show that its contributions to the works were independently copyrightable." *Id.*

As to intent, Ms. Janky has offered evidence that there was no intent by Mr. Farag and her to be joint authors. Initially, Ms. Janky completed the song "Wonders of Indiana," having composed 100% of the music and lyrics; Mr. Farag was not present at the time she created the original work. Subsequently, Mr. Farag made suggestions to revise approximately 10% of the lyrics of the song, which Ms. Janky incorporated. Mr. Farag did not revise the musical composition. In her November 9, 2005 Declaration, Ms. Janky states that, following the revisions:

> 6. I prepared a new copyright registration form for "Wonders of Indiana" p.k.a. "Indiana" and inserted Mr. Farag's name on a second Short Form PA copyright registration form as an indication of my gratitude, to designate his credit for the ideas, and to demonstrate that I appreciated every little bit of support, which is hard to obtain in this industry. I now understand that the proper way to give a "thank you" for any de minimis contribution is to give acknowledgment on the album credits and/or liner notes. I submitted the copyright form to the Copyright Office on or about December 16, 1999 and received a copyright registration certificate.
>
> 7. I never intended for Mr. Farag to acquire any copyright ownership interest in the song "Wonders of Indiana" p.k.a "Indiana" and I did not consider him to be a co-author of the song. Mr. Farag was not present when I originally created the song in early 1999. I created the music for the song 100% on my own. Mr. Farag's contributions to the song were minor and are limited to a few suggestions.

> 8. Mr. Farag never requested that I put his name on the copyright registration form.
>
> 9. Mr. Farag and I never discussed his intent or desire to share ownership of my song and he never told me that he thought my song belonged to him or told me to designate him as a joint author.

Pl. Br., Exh. E-2. Thus, Ms. Janky has explained that her motivation for including Mr. Farag's name on the December 1999 certificate of registration was not to grant him joint authorship but rather to give him "credit" for his contributions. *See also* Def. Resp., Exh. E, p. 65 (Janky dep.) (stating that she filed the December 1999 registration "to give Mr. Farag credit for what little he did"). She did not solicit his agreement in adding his name to the copyright registration, and she testifies that he did not express any desire to be included as an author of the revised song. In her deposition, she also explained that she learned afterwards that including his name and indicating "joint work" was not the way to give him credit for or acknowledge his contributions, which led her to file the third copyright application in 2003. *See* Def. Resp., Exh. E, p.68 (Janky dep.).

Ms. Janky also offers Mr. Farag's allegations in his Counterclaim, which explicitly deny that he gave her permission to include his name on the registration and claims that it is thus a fraudulent document. *See* Counterclaim, ¶ 1 [DE 4]. Although Mr. Farag states in the last sentence of that same paragraph of the Counterclaim that he is a "co-writer," this alone is not evidence of his or their intent at the time the revised song was created. *See Erickson*, 13 F.3d at 1071 (requiring that the intent be "at the time the work was

created"). Rather, it is a label that he has placed on his status that, without more, does not demonstrate intent.

As with the playwright and her play in *Erickson*, Ms. Janky had written the song in its entirety before Mr Farag made the revisions, revisions which were made for the purpose of complying with the requirements of LCCVB's song request. In *Childress v. Taylor*, the court found that an individual who enlisted a playwright to write a play and who provided background research, suggested scenes and characters, and discussed the progress of the written script with the playwright on a regular basis was not a co-author because the playwright was responsible for the actual structure of the play and the dialogue. 945 F.2d 500, 502 (2d Cir. 1991). Similarly, Ms. Janky is responsible for the structure of the song, having written the musical composition and the lyrics. Mr. Farag's minimal revisions were even more minor than the input provided by the non-author in *Childress*.

In *Erickson*, the court found that the defendant had produced some evidence of joint authorship as to one of the plays because the alleged co-author testified that at least two scenes were developed through collaboration and she considered the dialogue to be hers as well as the playwright's. 13 F 3d at 1072. In addition, the playwright had initially attributed the script to both the alleged co-author and herself. *Id.* (citing *Childress*, 945 F.2d at 508).[5] Likewise, there

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[5] However, the court ultimately found that none of the plays were joint works because the alleged joint authors' contributions could

are no written agreements between Ms. Janky and Mr. Farag or Street Gold Records regarding the playing or performing of the video. Unlike in *Erickson*, there is no testimony from Mr. Farag that he considered himself a co-author, other than the statement in his Counterclaim, and on what basis he might so consider himself. Nor is there any testimony or evidence regarding who made the decision to list both Ms. Janky and Mr. Farag as authors of the song on the album jacket. The fact of Mr. Farag's name under the song title on the album jacket, without more from Mr. Farag himself, is insufficient to establish intent.

Ms. Janky has offered evidence that there was no intent to be joint authors, including her sworn testimony as to her intent, but, in response, LCCVB offers no evidence of Mr. Farag's intent regarding joint authorship by way of deposition testimony, a declaration, or an affidavit of Mr. Farag articulating that intent. Rather, LCCVB argues simply that Ms. Janky's position that she did not intend joint authorship is belied by her having filed the December 1999 copyright registration form, and the only evidence of intent offered by LCCVB is the fact of the December 1999 copyright registration and the ASCAP registration.[6] However, as set forth above, the

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not be independently copyrighted. *See Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1072-73 (7th Cir. 1994).

[6] In its Motion for Summary Judgment, LCCVB asserts that "[t]he Album 'Doo-It Doo-Wop', on which the song *Lake County, Indiana* was recorded, was produced by Henry Farag via Street Gold Records," and that "Henry Farag via Farag Music BMI is the publisher of the song *Lake County, Indiana*." Def. Mot., ¶¶ 8-9. In the "Statement of Genuine Issues," which is strangely found in

December 1999 registration is only the starting point, serving as prima facie evidence of a valid copyright. Ms. Janky has offered evidence demonstrating that Mr. Farag was not a joint author and explaining her motivation for including his name on the December 1999 registration, shifting the burden to LCCVB to demonstrate a genuine issue of material fact as to that evidence. LCCVB cannot meet its burden by relying on the initial prima facie evidence; it must come forth with something more. Because it has not offered any evidence that Mr. Farag intended to be a joint author of the revised song, LCCVB has failed to create a genuine issue of material fact as to intent. Therefore,

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a motion for summary judgment that should be asserting there is *not* a genuine issue of material fact, LCCVB lists as the third and final issue: "As Publisher of the song *Lake County, Indiana*, Farag Music BMI Authorized Lake County Via a Non-Exclusive License to Play the Song, *Lake County, Indiana*." Def. Opp. Br., p. ii. However, LCCVB does not rely on, utilize, or analyze these alleged facts anywhere in the text of its Brief in Support of Motion for Summary Judgment, nor does it offer any legal authority related to these alleged facts.

Similarly, in its Response in Opposition to the Plaintiff's Motion for Summary Judgment, LCCVB asserts that "Plaintiff has also admitted that Mr. Farag had the exclusive distribution rights to the album Doo-It Doo-Wop which contained the song at issue." Def. Resp., ¶3; *see also* Def. Resp., ¶¶ 5c, 5d, 5e. And in the introduction to its Brief in Opposition, LCCVB writes, "As stated in plaintiff's deposition testimony, Mr. Farag had the exclusive distribution rights to both the album containing the song in question as well as the video performance of the song." Def. Opp. Br., p. 1. Yet, nowhere in its response does LCCVB utilize or analyze this alleged fact or present law that would render this alleged fact useful to LCCVB.

Accordingly, as no issue relating to publishing or distribution has been developed by LCCVB, the Court finds LCCVB has waived any such arguments and the Court will not address them.

LCCVB cannot establish the intent prong of joint authorship, which is needed to refute the presumptive validity of Ms. Janky's copyright registration.

Furthermore, even if intent could be established, Mr. Farag's contributions are not independently copyrightable, as argued by Ms. Janky in her Motion for Summary Judgment. Mr. Farag's contribution to the revised song was a ten percent revision of the lyrics to meet requirements articulated by LCCVB. "Ideas, refinements, and suggestions, standing alone, are not the subjects of copyrights." *Erickson*, 13 F.3d at 1072.[7] Consequently, LCCVB cannot establish the second element of the copyrightability test, and its assertion that Mr. Farag is a joint author must fail.

Finally, there is no evidence of a contract between Ms. Janky and Mr. Farag pursuant to 17 U.S.C. § 207(d) that would have granted Mr. Farag authorship status.

Consequently, LCCVB has not demonstrated joint authorship and thus has not refuted the prima facie evidence of the validity of Ms. Janky's copyright; Ms. Janky remains entitled to the presumption that her copyright is valid. In addition, because Mr. Farag is not a joint author, he did not have the authority to grant LCCVB a license to use the revised song.

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[7] In contrast, an example of independently copyrightable parts would be the lyrics and the music for a song, as suggested in the legislative history to 17 U.S.C. § 101. *See* H.R.Rep. No. 1476, 94th Cong., 2d Sess. 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736; S. Rep. NO. 473, 94th Cong., 2d Sess. 103-04 (1975).

2. Copying

"The most straightforward type of copying is the public performance of another's musical composition." *Broadcast Music, Inc. v. Niro's Palace, Inc.*, 619 F. Supp. 958, 961 (D.C. I ll. 1985) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157 (1975)). In her Motion for Summary Judgment, Ms. Janky asserts that there is no genuine issue of material fact that "Defendant Lake County publicly used, performed, copied, distributed and sold copies of 'Wonders of Indiana' a.k.a. 'Indiana' without Plaintiff Janky's authorization as well as without compensating Plaintiff Janky." Pl. Mot., ¶ 5.e. LCCVB does not deny that it used the revised song but rather argues that it used it with Mr. Farag's permission as joint author. Because the Court has found that Mr. Farag was not a joint author, LCCVB's reliance on any license granted by Mr. Farag as a joint author does not release LCCVB from its obligation to get permission from Mr. Janky prior to using the revised song. *See* 17 U.S.C. § 106(4).

The evidence of record that LCCVB played Ms. Janky's copyrighted song in public without a license from her is as follows. In her January 2004 Declaration, Ms. Janky states, "My musical work is part of an audio soundtrack for a 12-minute video for Lake County and is or was being shown in their Welcome Center as well as used on their phone lines and the background music for customers put on 'hold.'" Pl. Br., Exh E-1,¶ 10 (unsigned); Def. Br., Exh. 1, ¶ 10 (signed). In its Answer to Ms. Farag's Complaint, LCCVB alleges that "the musical works in question no longer appear as part of an audio/video soundtrack being shown at the Welcome Center. Lake County also

states that the musical works in question are not currently being used as background music for customers placed on hold." LCCVB Answer, ¶ 20 [DE 49]. In his Declaration, James Tsismanakis, the President/CEO of LCCVB testifies, "[LCCVB] has never played the promotional video in question or otherwise played the song 'Lake County, Indiana' in the State of Michigan." Pl. Br., Exh. D, ¶ 7. Indirectly, LCCVB admits use in its Answer: "Plaintiff's claims and/or damages are limited because of defendant's innocent infringement." LCCVB Answer, ¶ 12 [DE 49].

Ms. Janky also stated in her January 2004 Declaration, "I have not consented to the sale or use of my musical work to be licensed, published, or used by anyone. I have not received any royalties or payments for the licensed, published use or sale of 'Indiana' or 'Christmas Lullaby' from the Defendants." Pl. Br., Exh E-1,¶ 12 (unsigned); Def. Br., Exh. 1, ¶ 12 (signed). In her November 2005 Declaration, she testified, "Mr. Farag sold my song to Lake County Convention and Visitors Bureau. Lake County Convention and Visitor's Bureau used my music and lyrics without my consent and without compensating me for the sale and use of my song. Mr. Farag did not inform me that he was negotiating to sell my song to [LCCVB]." Pl. Br., Exh. E-2, ¶ 11. LCCVB has not offered any evidence that it sought or obtained Ms. Janky's consent to use the revised song in the Welcome Center, the video, and on its phone lines.[8]

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[8] There is no dispute that the only song Ms. Janky alleges was infringed by LCCVB is the revised song. *See* Def. Br., Exh. 8, p. 144 (Janky Dep.).

Accordingly, there is evidence of record to demonstrate some unauthorized use by LCCVB of Ms. Janky's revised song. However, the nature and extent of that use is unclear from the record and is left to be determined by the trier of fact. The issue of damages also remains for the trier of fact.

B. Indiana Tort Claims Act

LCCVB asserts that all of Ms. Janky's claims against it are barred by the Indiana Tort Claims Act ("ITCA"). Although not applicable to Ms. Janky's federal copyright claim, the ITCA could be applicable to Ms. Janky's Indiana state law claims. *See McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968) ("Under the Supremacy Clause, [the Illinois Tort Claims Act] cannot protect defendants against a cause of action grounded, as here, on a federal statute."); *see also Wade v. City of Pittsburgh*, 765 F.2d 405, 407-08 (3d Cir. 1985) (holding in a copyright infringement action that, although a tort claims act is effective against a state tort claim, "[t]he supremacy clause of the Constitution prevents a state from immunizing entities or individuals alleged to have violated federal law"); *Mary Doe v. Lance*, NO. 3:95-V-736RM, 1996 WL 663159, *5 (N.D. Ind. Oct. 30, 1996) ("Indiana law does not determine the subject-matter jurisdiction of the federal courts, but compliance with state jurisdictional requirements is a predicate for a state law claim.").

In her Motion for Summary Judgment, Ms. Janky argues that the ITCA is inapplicable in this case because her action was originally filed in Michigan. This conclusion is incorrect. Despite the original filing of this matter in the United States District Court for

the Eastern District of Michigan, the law of Indiana, not Michigan, is applicable because the transfer was made pursuant to 28 U.S.C. § 1631. Normally, a federal court sitting in diversity applies the forum state law. *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941) (citing *Erie Railroad v. Tompkins*, 304 U.S. 64, 74-77 (1938)). In contrast, when a case is transferred pursuant to 28 U.S.C. § 1404(a) on the motion of a defendant, the transferee court must follow the choice of law rules of the transferor court. *See Van Dusen v. Barrack*, 376 U.S. 612, 635-37 (1964).

However, this matter was transferred to the Northern District of Indiana, Hammond Division, from the Eastern District of Michigan pursuant to 28 U.S.C. § 1631, not 28 U.S.C. § 1404(a). Section 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title . . . is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed or noticed, and *the action . . . shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.*

28 U.S.C. § 1631 (emphasis added). When the transferor court determines that it lacks personal jurisdiction, as the Eastern District of Michigan did in this case, "the law of the transferee forum must apply, in order to prevent plaintiffs from enjoying

choice-of-law advantages to which they would not have been entitled in the proper forum." *Western Smelting & Metals, Inc. v. Slater Steel, Inc.*, 621 F. Supp. 578, 582 (N.D. Ind. 1985) (citing *Tillett v. J.I. Case Co.*, 756 F.2d 591, 593 n. 1 (7th Cir.1985); *Gonzalez v. Volvo of Am. Corp.*, 734 F.2d 1221, 1223 (7th Cir.1984); *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir.1983); *Roofing and Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 992 (11th Cir.1982); *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1110 (5th Cir.1981); *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 165 (3d Cir.1980), *rev'd on other grounds*, 454 U.S. 235 (1981); *Martin v. Stokes*, 623 F.2d 469, 475 (6th Cir.1980)). Accordingly, this matter must proceed as if it had been filed in the Northern District of Indiana, the transferee court, on October 30, 2003, the date on which Ms. Janky actually filed her Complaint with the Eastern District of Michigan, the transferor court.

The Indiana Tort Claims Act ("ITCA") requires, as a prerequisite to a tort action, that notice to a political subdivision be filed within 180 days of the occurrence of the loss:

> Except as provided in section 9 of this chapter, a claim against a political subdivision is barred unless notice is filed with:
> (1) the governing body of that political subdivision; and
> (2) the Indiana political subdivision risk management commission created under IC 27-1-29; within one hundred eight (180) days after the loss occurs.

Ind. Code § 34-13-3-8. Under the ITCA, notice "must describe in a short and plain statement the facts on which the claim is based. The statement must include the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, the amount of the damages sought, and the residence of the person making the claim at the time of the loss and the time of filing the notice." *Alexander v. City of South Bend*, 256 Supp. 2d 865, 876 (7th Cir. 2003) (quoting Ind. Code § 34-13-3-10; citing *LCEOC, Inc. v. Greer*, 699 N.E.2d 763, 767 (Ind. Ct. App. 1998)).

"Compliance with the notice provisions of the ITCA is a procedural precedent which the plaintiff must prove and which the trial court must determine before trial." *Id.* at 875 (quoting *Davidson v. Perron*, 716 N.E.2d 29, 34 (Ind. Ct. App. 1999)). "Once a defendant raises failure to comply with the ITCA's notice requirements, the burden shifts to the plaintiff to prove compliance." *Id.* "A governmental entity's immunity from liability under the ITCA is a question of law for the court." *Alexander*, 256 F. Supp. 2d 865, 875 (N.D. Ind. 2003) (citing *City of Anderson v. Davis*, 743 N.E.2d 359, 362 (Ind. Ct. App. 2001)).

LCCVB asserts that it is a political subdivision for purposes of Indiana Code § 34-6-2-110, and Ms. Janky does not disagree in her Motion for Summary Judgment. LCCVB was created by the Indiana General Assembly, *see* Ind. Code § 6-9-2-3, and is funded by the Lake County Innkeeper's Tax through the "promotion fund," *see* Ind. Code §§ 6-9-2-1, 6-9-2-2. The LCCVB has fifteen members, who are appointed by the executives of the eight largest municipalities in the county (one appointment each), the legislative body

of the two largest municipalities (one appointment each), the county council (two appointments), the county commissioners (two appointments), and the lieutenant governor (one appointment). *See* Ind. Code §§ 6-9-2-1, 6-9-2-3(a)-(g). Members of the bureau take an oath of office that is filed with the clerk of the circuit court of the county. Ind. Code § 6-9-2-3(l). The powers of LCCVB include the capacity to sue and be sued and to exercise the power of eminent domain to acquire property to promote and encourage conventions, trade shows, special events, recreation, and visitors within the county. Ind. Code § 6-9-2-4. The statute further requires that "[a]ll money in the promotion fund shall be deposited, held, secured, invested, and paid in accordance with statutes relating to the handling of *public funds*. The handling and expenditure of money in the promotion fund is subject to audit and supervision by the state board of accounts." Ind. Code § 6-9-2-4(c) (emphasis added). In the event LCCVB approves the execution of a lease, the bureau may only do so having found "that the services to be provided through the life of the lease *will serve the public purposes for which the bureau was created and that the execution of the lease is in the best interests of the residents of the county*." Ind. Code § 6-9-2-4.7(e) (emphasis added). Moreover, the statute provides that the "financing of the construction, acquisition, and equipping of a visitor center to promote and encourage conventions, trade shows, special events, recreation, and visitors within the county serves a public purpose and is of benefit to the general welfare of the county by encouraging investment, job creation and retention, and economic growth and diversity." Ind. Code § 6-9-2-5.5. The Court finds that LCCVB is a political subdivision for the purposes of § 34-6-2-110.

In her Brief in Support of her Motion for Summary Judgment, Ms. Janky admits that she did not give LCCVB notice of the infringement. In contradiction, Ms. Janky states in her Declaration generally that she gave LCCVB notice of its infringement. However, Ms. Janky provides no details or proof in support that any such notice was proper under the ITCA or, more importantly, that it was timely. Because Ms. Janky has not complied with the 180-day notice provision of the ITCA, Ms. Janky's Indiana state law claims are barred. However, as noted above, the ITCA does not bar her federal claims under the copyright act.

CONCLUSION

Based on the foregoing, the Court (1) **GRANTS in part** and **DENIES in part** Defendant Lake County Convention & Visitors Bureau's Motion for Summary Judgment [DE 29]; (2) **GRANTS in part, DENIES in part**, and **DENIES in part as moot** Plaintiff Cheryl Janky's Motion for Summary Judgment [DE 63]; and (3) **DENIES as moot** Plaintiff Cheryl Janky's Request to Schedule Oral Argument on Plaintiff's Motion for Summary Judgment [DE 65].

The Plaintiff's state law claims against Defendant Lake County Convention and Visitors Bureau are **DISMISSED**; however, the Plaintiff is **GRANTED** summary judgment on her federal copyright claim against LCCVB on the issue of her ownership of a valid copyright in the revised song and on the general assertion that LCCVB played her song publicly without her authorization. The determination of the nature and extent of the infringement as well as damages remain a question for the trier of fact. The Plaintiff's motion as to Defendant Henry Farag is

DENIED as moot in light of the discharge in bankruptcy.

So ORDERED this 29th day of March, 2006.

s/ Paul R. Cherry
MAGISTRATE JUDGE PAUL R. CHERRY
UNITED STATES DISTRICT COURT

cc: All counsel of record, Henry Farag *pro se*

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Nos. 07-2350, 07-2762 & 08-1606

October 2, 2009

Before

WILLIAM J. BAUER, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

TERENCE T. EVANS, *Circuit Judge*

CHERYL JANKY,	)
Plaintiff-Appellee / Cross-Appellant,	)
	)
v.	)
	)
LAKE COUNTY CONVENTION AND VISITORS BUREAU,	)
Defendant-Appellant / Cross-Appellee.	)
	)

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division.

No. 05 C 217
Andrew P. Rodovich, *Magistrate Judge*.

ORDER

On August 17, 2009, the plaintiff-appellee/cross-appellant Cheryl Janky filed a petition for rehearing and petition for rehearing en banc. All the judges on the panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore **DENIED**.

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(2)

FILED
JAN 29 2010

No. 09-793

In The
Supreme Court of the United States

CHERYL JANKY,

Petitioner,

v.

LAKE COUNTY CONVENTION AND VISITORS BUREAU,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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January 29, 2010

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QUESTION PRESENTED

WHETHER PETITIONER HAS PRESENTED COMPELLING REASONS AS IDENTIFIED BY SUP. CT. R. 10(A) TO GRANT THE PETITION, WHERE THE ISSUES AS FRAMED BY PETITIONER WERE NEVER PRESENTED IN THE DISTRICT OR APPELLATE COURTS AND ARE BASED ON A MISREPRESENTATION OF THE RECORD BY PLAINTIFF WHERE PLAINTIFF AND HER COUNSEL HAD PREVIOUSLY ACKNOWLEDGED THAT THE SONG AT ISSUE WAS JOINTLY AUTHORED BY PLAINTIFF AND FARAG RESULTING IN FARAG HAVING THE AUTHORITY TO LICENSE THE SONG TO RESPONDENT LCCVB THEREBY NECESSITATING ENTRY OF SUMMARY JUDGMENT IN THE DISTRICT COURT CONSISTENT WITH THE LAW PERTAINING TO JOINT AUTHORSHIP OF A SONG?

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CONSISTENT WITH THE LAW PERTAINING TO JOINT AUTHORSHIP OF A SONG. 27

A. Petitioner fails to present any conflict in the decision of the Court of Appeals and has not met her burden of demonstrating compelling reasons for the petition to be granted where plaintiff ignores or otherwise misrepresents the record, electing to continue to engage in false and sanctionable accusations of Respondent's counsel. 27

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STATEMENT OF THE CASE

A. Nature of the Case

On October 3, 2003, plaintiff filed a six-count complaint in Federal Court in Michigan against: Henry Farag ("Farag"); his production company, Street Gold Records; and Lake County Convention & Visitors Bureau ("LCCVB") concerning plaintiff's claim of copyright infringement of a promotional song known as "Lake County, Indiana," and five related state law counts. (R 1, ¶ 1.) (R 1; R 11, p. 1.) On March 31, 2005, the case was transferred to the Northern District of Indiana. (R 11, pp. 12-13.)

In 1999, Farag was the manager of a musical group known as Stormy Weather. Janky was one of its members. (R 333, p. 2.) Farag was asked by the CEO of the Respondent LCCVB, Speros Batistatos, if Stormy Weather would like to create a song to represent Lake County for cross-promoting Lake County and Stormy Weather. In the spring of 1999, Farag announced at a rehearsal that LCCVB was looking for a song to represent Lake County. (R 333, p. 2.) Ultimately, Janky and Farag revised a work of Janky's entitled "Wonders of Indiana" to conform with LCCVB's requirements. This song became known as "Lake County, Indiana." *Id.* Janky filed a copyright registration in December 1999 for this derivative song **and signed both her and Farag's names on the form identifying the revised song as a "joint work" and Janky and Farag as "owner[s] of exclusive rights" in the song.** [Emphasis added.] (R 29, Exhibit 2; R 333, p. 2.)

In July 2000, after plaintiff left Stormy Weather, plaintiff refiled the application to correct an error on the December application, but did not remove the authorship attribution to Farag on his ownership rights. Vol. I Trial Transcript, Vol 5, pp. 79-102.

As co-author of the song, and in conjunction with the request by LCCVB, Farag provided a non-exclusive license to LCCVB to use the song. (R 29, pp. 7-8, Exhibit 6,¶ 7.)

On July 21, 2005, LCCVB filed a motion for summary judgment maintaining that plaintiff's claims should be dismissed because plaintiff failed to comply with the notice provisions of the Indiana Tort Claims Act ("ITCA"). Ind. Code § 34-13-3-8. Further, as a joint owner and author of "Lake County, Indiana," Farag was authorized to issue a non-exclusive license to LCCVB for use of the song. Therefore, there was no copyright infringement.

Plaintiff filed no timely response to LCCVB's summary judgment motion. (R 88, pp. 3-4, A 83-108.)

On November 9, 2005, Janky filed a motion for summary judgment. (R 88, p. 4, A 86.) The Court considered it a cross-motion for summary judgment and not a response to LCCVB's Motion for Summary Judgment. (R 88, p. 7, fn. 1, A 89.) The Court granted LCCVB's motion in part dismissing the state counts for plaintiff's failure to comply with ITCA. The Court, however, granted plaintiff partial summary judgment on copyright infringement leaving damages for jury resolution. (R 88, p. 26, A 108.)

The case was tried before a jury from March 12, 2007, through March 16, 2007. (R 225, A 243, R 226, R 227, R 228, R 229.) Janky was awarded $100,000.00 but reduced to setoff the sanctions that had been imposed for Janky's refusal to admit that jurisdiction was never proper in Michigan. (R 333, p. 2.)

On March 29, 2007, LCCVB filed a FRCP 59 Motion for Remittitur, or in the Alternative, New Trial on Damages. (R 247.) The Court denied the Motion. (R 267, A 1-9.)

On June 7, 2007, LCCVB filed its Notice of Appeal to the 7th Circuit from R 267. (R 282-304.)

Janky also filed a cross-appeal involving the $2,500.00 sanction against Janky's attorney, Gregory Reed, pursuant to FRCP 11. The sanction was imposed because Mr. Reed had filed a motion entitled "Motion for Impoundment" where Mr. Reed made the factually bereft claim that Henry Farag and respondent LCCVB had a partnership for the continued sale of the album containing the song which is the subject of this copyright claim. (R 187, Order Granting Motion for Costs and Attorney Fees.) Earlier, while the matter was pending before the Federal District Court in Michigan, plaintiff's counsel made the same argument about a partnership between Farag and LCCVB. Judge Borman of the U.S. District Court for the Eastern District of Michigan previously held that plaintiff "wrongly characterized" the

relationship between LCCVB and Farag as a partnership. (R 13, p. 9, Order Transferring Venue.)[1]

In its appeal to the 7th Circuit, LCCVB raised four issues for review which are set forth below:

I Did the District Court Commit Error Requiring Reversal in Denying Defendant's Motion for Summary Judgment on Plaintiff's Copyright Infringement Claim and Granting Plaintiff Summary Judgment on Infringement, Where Defendant's Motion Was Unopposed and Where the Copyright Application Filed by Plaintiff Identifies the Derivative Song at Issue "Lake County, Indiana" as a Joint Work Authored by Janky and Farag and Where Each Co-owner Has the Right to Use or to License the Use of the Work And, at a Minimum, a Question of Fact Existed as to Coauthorship and Co-ownership?

II Did the District Court Abuse its Discretion by Not Granting Defendant's FRCP 41(b) Motion for Involuntary Dismissal Where Plaintiff Repeatedly Failed to Comply with Court Orders and Deadlines, "Admonished" the Plaintiff for Her Non-compliance Which "May Result in Further Sanctions or Dismissal of Her Action" and Where, Despite this Admonition, the Plaintiff Continued to

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[1] Not to be deterred, plaintiff's counsel Gregory Reed makes the same factually bereft and record-empty contention in this petition. See Plaintiff's Petition, pp. 2, 7 and 14.

Violate Court Deadlines and the Court Even Acknowledged That Plaintiff's Failures to Comply with Court Imposed Deadlines "Impeded LCCVB's Ability to Prepare this Matter for Trial?"

III Where the District Court Failed to Adhere to FRCP 16(e) That Modifications to the Final Pretrial Orders Can Occur Only to Prevent Manifest Injustice, Is Defendant Entitled to a New Trial Because the Stricken Stipulated Facts Materially Changed Defendants' Trial Strategy in Regard to Presentment of Proofs?

IV Did the District Court Commit Error Requiring Reversal When it Denied Defendant's Motion for Remittitur, or in the Alternative, New Trial on Damages.

In an August 3, 2009 opinion, the 7th Circuit resolved the case based on the first issue identified in LCCVB's appeal, finding that Farag and Janky were both joint authors of the work in question. Consequently, as Farag was a joint author of the work, he could license it to LCCVB. (7th Circuit Opinion, pp. 9-13.) Therefore, there was no copyright infringement by LCCVB in its use of the song. The 7th Circuit ordered that summary judgment be entered in favor of LCCVB. (7th Circuit Opinion, p. 14.) In connection with the cross-appeal, the Court found there was no error in imposing Rule 11 sanctions against Mr. Reed. (See 7th Circuit Opinion, pp. 13-14.)

On August 17, 2009, Janky filed a petition for rehearing and petition for rehearing en banc.

On October 2, 2009, the 7th Circuit denied the petition, concluding that "All the judges on the panel had voted to deny a rehearing, and none of the judges in active service have requested a vote on a petition for rehearing en banc." Plaintiff's Appendix, pp. 5, 73a - 74a.

B. Statement of Facts

Before setting out the record evidence relative to petitioner's arguments, it is necessary for respondent to observe that petitioner's statement of the case contains misstatements and omissions as to the facts in the record before the lower courts. Also, petitioner's argument contains unsubstantiated factual allegations that are false, and if not for the otherwise applicable judicial privilege, would form the basis for a libel action.[2] These misrepresentations and omissions will be identified below.

In 1999, Henry Farag was the manager and leader of the musical group Stormy Weather. Janky was one of its members. (R 333, p. 2.)

Farag was asked by the CEO of Respondent Speros Batistatos, about creating a song to represent Lake County that could be used to promote Lake County. Accordingly, Farag announced at a rehearsal one evening in the spring of 1999 that LCCVB was looking for a song to represent Lake County. (R 333, p. 2.) Janky understood that anyone was welcome to write

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[2] As stated in the previous section, one misrepresentation continuing to be propounded by plaintiff's counsel is that there is a partnership between LCCVB and Farag.

the song, including the public at large. (R 178, A 155-154; R 71, Exhibit 8, p. 35.)

Janky and Farag revised a prior copyrighted work of Janky's entitled "Wonders of Indiana" to conform with the requirements of LCCVB. *Id.*[3] Farag participated in the significant revisions of the song that was ultimately accepted by LCCVB. Janky now claims she believed that she was writing the song for LCCVB's use as part of a contest. (R 71, Exhibit 8, pp. 35-36.) Janky incorporated Farag's changes and prepared a new copyright registration for this derivative work dated December 16, 1999. She signed her and Farag's names to a copyright registration (PAU 2-485-026) for the revised song that was used by LCCVB. (R 178, p. 4.) On the copyright registration, Janky gave herself credit for the music and lyrics and identified Farag as a co-author providing "additional lyrics/joint work." (R 29, Exhibit 2; and R 178.) Both are listed on the registration as copyright **claimants and owners of exclusive rights.**[4] *Id.*

Janky recorded the revised song with Stormy Weather at Thunderclap Studios. (R 178, p. 8, A 158.) The recorded acappella song was given to LCCVB for its review. (R 178, p. 8; and R 171, with Exhibit 8, p. 40.) The Thunderclap recording was the only recording of the revised/derivative song that Ms. Janky made. (R 178, p. 8, A 158; R 71, Exhibit 8, p. 49.)

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[3] Plaintiff copyrighted the song "Wonders of Indiana" a/k/a "Indiana" on May 6, 1999. (R 178, p. 4, A, p. 153-4.)

[4] For the 7th Circuit, this acknowledgment by Janky herself was some of the strongest evidence showing intent to create a joint work. (7th Circuit Opinion, pp. 10-11.)

In April 1999, LCCVB recorded a video of Stormy Weather performing the song. No money was offered to the group for the video, all the parties agreeing that "payment" by LCCVB would be by way of promotional consideration of the group in exchange for a nonexclusive license for LCCVB to use the revised song and video. (R 29, p. 2; R 333, p. 3.)

On December 1, 1999, at the grand opening of the LCCVB Visitor's Center, the video containing the song "Lake County, Indiana" was played. (R 333, p. 8.) Janky performed the song live at the opening. (R 11, pp. 72-73, R 248, pp. 2-6.)

The album "Doo-It Doo-Wop" was created by Stormy Weather beginning in January 2000 and completed around June 2000. (R 29.) The jacket cover for the album lists Cheryl DeRosier (a/k/a Cheryl Janky) and Farag as co-authors of the song with Farag Music BMI as the publisher of the song. (R 29, p. 2.) (Janky left Stormy Weather prior to the release of the album). Janky claimed she never gave consent for the use of her song on the "Doo-It Doo-Wop" album. (R 71, p. 138; R 178, p. 9, A 158.) Farag testified that as a co-owner of the revised song, he issued a non-exclusive license to LCCVB to use the song. (R 71, Exhibit 6, ¶¶ 6-11; R 178, p. 6, A 158.)

Farag declared that during the creation of the sound recording for "Lake County, Indiana," significant changes were made, in the lyrics and melody from what was originally presented by Janky, with changes made throughout the recording process. (R 132, Exhibit 1, ¶¶ 9, 11.)

LCCVB purchased 1000 CD's and 500 cassettes of the Doo-It Doo-Wop Album, copyrighted 2000. Of the approximately 15 songs on the album, one was the song at issue. (R 71, Exhibits 4, 7, R 333, p. 3.)[5] There was no other payment. *Id.* LCCVB sold them at the Welcome Center located in Hammond, Indiana. (R 71, with Exhibits. 4, 7.)

On August 7, 2002, Janky and other former members of Stormy Weather pitched a new song to LCCVB sung by Janky as a replacement for the song "Lake County, Indiana." (R 132, p. 9, Exhibit. 4.) LCCVB declined. (*Id.*)

In a June 13, 2003 letter sent to the LCCVB and its then CEO, James Tsismanakis, counsel for Janky, Mr. Reed, stated in part:

> We must inform you that our client, publisher and **co-writer** Cheryl Janky, retains all publishing, licensing, control rights to this song and has not authorized nor consented to the license for sale of this song. [Emphasis added.]

(R 132, p. 11, Exhibit 5.)[6]

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[5] Janky conceded that she received royalty checks from Street Gold Records, Henry Farag's sole proprietorship, for the sales of the album, but never cashed any of the checks claiming that they were not of sufficient value to reflect her work on the album and particularly the song "Lake County, Indiana." (R 71, Exhibit 8, pp. 73-74.) Again, petitioner distorts the record when she states she was not paid for the song . (See Petition, p. 7.)

[6] Hence, contrary to plaintiff's counsel's baseless accusation that LCCVB, through its counsel, misrepresented the truth by "falsely

C. Litigation History

October 3, 2003, plaintiff filed her complaint alleging copyright infringement and five state law claims in the Federal Court in Michigan. (R 1.) Janky alleged that LCCVB engaged in the unauthorized use of two songs, "Wonders of Indiana" and "Christmas Lullaby."[7] (R 1, ¶¶ 14, 18, 25.) Plaintiff claimed that the "Wonders of Indiana," song was written by Janky in response to Farag's solicitation for a song which was recorded as a song for a contest. (R 1, ¶ 14.)

Janky also claimed in her complaint that Farag represented himself as a sole copyright owner of the "Wonders of Indiana" song in his contractual relationship with LCCVB. (R 1,¶ 21.)

On or about January 7, 2004, Farag filed his answer to plaintiff's complaint, affirmative defenses, and counterclaims against Janky. (R 4, Answer and Counterclaim.) In his affirmative defenses, Farag stated that plaintiff's claims were barred because "plaintiff claims copyright to work that did not belong to plaintiff' and "plaintiff lacks standing to assert claims for each claimed copyright." (R 4, Affirmative Defenses 8 and 9.) In the counterclaim, Farag states that "Cheryl Janky has also sought copyrights on 'Lake County, Indiana' without advising the *co-writer* Henry Farag." [Italics added.] (R 4, Counterclaim,

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asserting that Janky was a joint author," Mr. Reed's own correspondence "falsely" asserts the same thing.

[7] As it turned out, the allegation regarding "Christmas Lullaby" was false.

¶ 1.)[8] The counterclaim also included infringement of Farag's trademarks, unjust enrichment, use of trade secrets, and other "deceptive practices." (R 4, Counterclaim, ¶¶ 4, 5, and 8.)

On June 21, 2004, LCCVB issued its requests for admission on jurisdiction. (R 125.) On June 18, 2004, Plaintiff denied that jurisdiction was not proper in Michigan. (R 125.) LCCVB moved for summary judgment on jurisdiction on July 16, 2004. *Id.* In the court's order finding that jurisdiction was not proper over LCCVB in Michigan and transferring the matter to Indiana, the court rejected plaintiff's contention that there was a partnership between LCCVB and Farag to nationally distribute the Doo It Doo Wop Album. (R 11, pp. 9-10.) In fact, the court observed that: "Plaintiff wrongly characterizes the 'partnership' referred to by defendant Farag in his deposition. The Court finds that defendant Farag uses the term 'partner' in reference to the agreement to record the song and not as plaintiff suggests" [to market the Doo It Doo Wop Album nationally]. (R11, pp. 9-10.)[9]

On July 21, 2005, LCCVB filed its motion for summary judgment. (R 29.) LCCVB argued that Janky failed to comply with ITCA notice provisions, Indiana Code, § 34-13-3-8. LCCVB also argued that as a joint owner and author in the copyright of "Lake County, Indiana," Farag was authorized to provide

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[8] In Plaintiff's petition, plaintiff fails to acknowledge that the counterclaim identifies Henry Farag as a co-writer of the song.

[9] Plaintiff's Petition again asserts that Farag and LCCVB were partners despite the evidence to the contrary. (See Petition, pp. 2, 6, 14, and 16.)

LCCVB a non-exclusive license to play the song, "Lake County, Indiana" pursuant to 17 U.S.C. § 201(a).[10] *Id.*

On August 10, 2005, Janky filed an amended complaint. LCCVB objected. (R 88, p. 3, A 85.) Among the reasons for the objection was that the amended complaint was filed past the amendment cut-off date. (R 39.) Prior to LCCVB receiving a copy of the proposed amended complaint, defendant learned that an amended complaint had already been filed with the court. Plaintiff was attempting to amend a prior factual statement in addition to amending the case caption. Plaintiff was attempting to change ¶ 16 by subterfuge, identifying Janky as a 90% owner of the lyrics as opposed to an 80% owner which was in the original complaint. *Id.*, p. 2.[11]

On September 9, 2005, Janky filed a motion for leave to file an amended complaint and a motion to strike LCCVB's summary judgment motion. (R 88, p. 3; A 85.) On September 19, 2005, LCCVB filed its response to both motions. (R88, A 85.) *Id.* In response to the motion for leave to file an amended complaint, LCCVB maintained that it was past the amendment cutoff date and was futile.

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[10] Cheryl Janky admitted in a declaration that Farag had, at a minimum, 10% interest in the copyright even though the copyright filing did not disclose or attribute percentage of ownership. (R 29, Exhibit 1 and Exhibit 2.)

[11] Farag's potential liability was ultimately discharged in bankruptcy and he was dismissed from this case. (R 88, p. 2, A 84.)

On September 12, 2005, the court ordered that the August 10, 2005, amended complaint be stricken.

On October 21, 2005, plaintiff filed a motion for leave to file a second amended complaint and a motion for an extension of time to file a response to LCCVB's summary judgment motion. (R 88, p. 3, A 85.) Plaintiff claimed that the extension was requested, "due to the oppressive tactics by defendants [sic] and their counsel's unreasonable request and improper filing of matter [sic], but not limited to other inappropriate tactics by defendants' [sic] counsel conduct which has expanded and interrupted the plaintiff's responsive brief." (R 53, ¶ 1.) Although plaintiff did not reference or file any evidence to support the allegation in ¶ 1, plaintiff alleged that, "defendants' [sic] counsels have filed a stipulation on May 2, 2005, that a motion for summary judgment was premature until the completion of discovery." (R 53, p. 2, ¶ 2.) As an alternate excuse, plaintiff alleged that one of the two attorneys representing her, Stephanie Hammonds, "had been under doctor care for a substantial period of time, at which time she was able [sic] to work for a series of weeks respectively around the time of the filing of Defendant Lake County's motion for summary judgment [in July of 2005]." *Id.*, p. 2. Plaintiff's counsel asserted that, "[T]he overload in addressing various matters in this case, absent the support of co-counsel, has disable [sic] the lead counsel, Gregory Reed, and has adversely hindered opportunity to reasonably respond within the required period to all outstanding matters." *Id.*[12]

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[12] Plaintiff never articulated any of these "outstanding matters."

On October 27, 2005, the court denied the motion to strike LCCVB's summary judgment motion, denied the motion for extension of time to file a response to LCCVB's summary judgment motion and ordered that the untimely response to the motion for summary judgment be stricken. (R 88, pp. 3-4, A 85-86.)[13]

On November 8, 2005, LCCVB filed a FRCP 41(b) motion to dismiss for lack of prosecution. (R 61.)

On November 9, 2005, plaintiff filed her summary judgment motion. (R 63; and R 64.) Plaintiff contended that the song was not a "joint work" because Farag's contribution was "de minimus." According to plaintiff, it was her "gratuitous nature to give credit for revised lyrics by inserting defendant Farag's name on the copyright registration form" and it was not her intent for it to be a joint work. (R 64, p. 7, Exhibit E-2.)

Janky claimed that "I now understand that the proper way to give a 'thank you' for any de minimis contribution is to give acknowledgment on the album credits and/or liner notes." (R 63, Exhibit 2, p. 6.)[14]

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[13] Under N.D. Ind. L. R. 56.1(a), the response to a motion for summary judgment is due within 30 days from the date the motion is served.

[14] In a November 9, 2005, Declaration Janky declared that her "intent" in including Farag on the December 16, 1999, copyright registration of the revised song was to indicate her "gratitude," designate credit for his ideas, and to demonstrate that she "appreciated every little bit of support, which is hard to obtain in this industry." (R 63, Exhibit 2, Janky Declaration, ¶ 6; and R 178, p. 4, A 154.)

Janky further asserted, "I never intended for Farag to acquire any copyright ownership interest in the song, "Wonders of Indiana" a/k/a "Indiana" and I did not consider him to be a co-author of this song." (R 63, Exhibit 2, ¶ 7; and, R 178, p. 5, A 155.)[15]

LCCVB responded noting Plaintiff admitted in both her affidavit and deposition testimony that LCCVB's use of the song was authorized by the "co-author of the song, defendant Henry Farag." (R 71, Exhibit A.) In her deposition, Janky conceded Farag had the exclusive distribution rights of the album containing the song. (R 71, Exhibit 8, pp. 147-148.)

Farag declared that he provided LCCVB a non-exclusive license to play the song "Lake County, Indiana" at the Visitors Bureau. (R 71, Exhibit 6,¶ 6.) In exchange for this nonexclusive license, Stormy Weather received publicity/marketing, and no fees were paid. (R 71, Exhibit 6, ¶ 7.)[16]

On March 29, 2006, the Court issued its opinion on the cross motions.

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[15] The 7th Circuit gave this affidavit "little weight" in light of the earlier (pre-suit) copyright registration. (7th Circuit Opinion, p. 11.)

[16] Despite plaintiff's arguments in her summary judgment motion, plaintiff testified that it was her intent to give Farag credit as joint composer of the lyrics. (R 71, Exhibit 8, pp. 39-40, 61-62, 64-66, 68-70.)

The Court acknowledged LCCVB's motion was unopposed because of Janky's untimely response. (R 88, p. 7, fn. 1, A 89.)[17]

The Court concluded that partial summary judgment should be granted in favor of plaintiff for copyright infringement because the court found no joint authorship. (R 88, p. 15, A 97.)

Joint authorship is a two-part test requiring that the parties (1) intended to be joint authors at the time the work was created and (2) the party must show that its contributions to the work were "independently copyrightable." *Id.* The trial court held that based on Janky's declaration filed six years after the filing of the December 9, 1999, copyright, it was not her intent to grant Farag joint authorship. (R 88, pp. 15-16, A 97-98.) The trial court also based its decision in part on the allegation in Farag's counterclaim that denied he gave her permission to include his name on the registration because Farag believed the song to be a work for hire for LCCVB. (R 88, pp. 15-16.) The Court rejected LCCVB's argument that Janky's position was belied by her December 19, 1999, copyright registration form and the ASCAP registration showing joint ownership. *Id.* Finally, the Court concluded that Janky's assertion that Farag's 10% revision of the lyrics (although never establishing what lyrics were revised) rendered Farag's contribution not independently copyrightable. (R 88, p. 19, A 101.)

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[17] Under FRCP 56(e)(2), the opposing party is obligated to respond to a motion for summary judgment and "if the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."

Inexplicitly, however, the Court held, "Consequently, LCCVB has not demonstrated joint authorship, and thus has not refuted *the prima facie evidence of the validity of Ms. Janky's copyright; Ms. Janky remains entitled to the presumption that her copyright is valid.*" (R 88, p. 19, A 101.) Consequently, because Farag was found not to be a joint author, he had no authority to grant LCCVB a license to use the revised derivative song. *Id.* (R 88, p. 21, A 103.) The Court granted LCCVB summary judgment on the remaining state law claims because of noncompliance with ITCA. (R 88, p. 25, A 107.)

On March 29, 2006, the Court denied LCCVB's motion for dismissal under FRCP 41(b). The Court, concluded: "However, the Court now **ADMONISHES** the plaintiff, Cheryl Janky, that further failure to comply with Court-ordered deadlines may result in further sanctions or dismissal of her action." (R 89, p. 5, A 113.)

On June 1, 2006, the Court also limited Janky's evidence at trial, because plaintiff failed to disclose any potential witnesses pursuant to FRCP 26(a), and she was in violation of the Court's scheduling order requiring her to provide her portions of the proposed pretrial order to LCCVB by May 1, 2006. (R 123, pp. 2-4.) The Court went through a review of all the violations of court orders and deadlines:

> On March 29, 2006, in denying LCCVB's Rule 41.1 Motion to Dismiss, the Court admonished Ms. Janky that any further failure to comply with Court-ordered deadlines may result in further sanctions or dismissal of her action.

> Ms. Janky has not disclosed any potential witnesses pursuant to Rule 26(a)(1) and has not disclosed any witnesses through discovery devices (interrogatories, requests for production of documents). Ms. Janky violated the Courts' October 27, 2005 Scheduling Order, which required her to provide LCCVB with her portions of the proposed pretrial order by May 1, 2006. LCCVB timely filed the proposed pretrial order by the May 18, 2006 deadline without the benefit of Ms. Janky's portion. Ms. Janky belatedly filed a proposed pretrial order on May 19, 2006, moments before the final pretrial conference, and then filed a corrected proposed pretrial order on May 22, 2006. **These failures have impeded LCCVB's ability to prepare this matter for trial.** [Emphasis added.]

(R 123, p. 4.)

On June 7, 2006, LCCVB filed a motion for reconsideration of the summary judgment order. (R 132).

On June 7, 2006, LCCVB also filed a motion to dismiss the case again based on FRCP 41(b) where plaintiff, as part of her trial brief (filed on June 5, 2006, R 124), issued 10 subpoenas to various entities pertaining to phone records, internet broadcasting, advertisements, etc. (R 135, Renewed 41(b) Motion, p. 3.) This violated the order restricting plaintiff to limited witnesses and documents and the 10 subpoenas were issued well-beyond the close of discovery. (R 135.)

On June 7, 2006, the Court denied defendant's second 41(b) motion. (R 136, a 438-452.) In its order, the Court acknowledged that Janky, "[s]eeks this new discovery [issuance of the 10 subpoenas] by subpoena long after the close of discovery, [and] despite the Court's ruling limiting the scope of documentary evidence and witnesses that Ms. Janky will be permitted to attempt to introduce or call to testify at trial," and denied use of this untimely discovery. (R 136, p. 2. A-451-452.)

On June 30, 2006, plaintiff filed a motion to add Speros Batistatos. (R 155.) On July 4, 2006, plaintiff filed a motion to "add key board officers." (R 158.)

On September 22, 2006, the Court denied plaintiff's motions to add Batistatos and key board officers as untimely. (R 180, p. 3.) The Court concluded: "In light of [] Ms. Janky's failure to show good cause pursuant to FRCP 16 and given the Court's multiple prior admonitions of Ms. Janky for failure to comply with court-ordered deadlines, both motions are denied as untimely." (R 180, p. 3.)

On September 22, 2006, the Court issued its order granting in part and denying in part LCCVB's motion for reconsideration (R 178):

> Upon further consideration of the evidence that was offered in support of and in response to summary judgment on the issue of joint authorship that controverts the substance of her declaration, the Court reconsiders its earlier finding that no joint authorship based on the intent prong of the test. The Court now finds

> that there is a genuine issue of material fact as to the intent requirement for joint authorship.

(R 178, pp. 18-19, A 168-169.)

Nevertheless, the Court reaffirmed summary judgment on copyright infringement holding that Farag's contribution, "is not 'independently copyrightable' mandating the entry of summary judgment in favor of Ms. Janky on the issue of joint authorship,"despite never being shown who wrote which lyrics or melody. (R 178, p. 20, A 170.) The Court held that Janky's declaration that Farag's contribution was 10 percent was insufficient to be independently copyrightable. (R 178, pp. 21-22, A 1171-172.)[18]

On February 7, 2008, plaintiff reviewed the proposed pretrial order, including stipulated facts. Plaintiff had no changes to the 29 stipulated facts. Accordingly, the pretrial order was filed on February 8, 2007. (R 199, A 199.)

On February 9, 2007, the Court held the final pretrial conference. While plaintiff objected to portions of the pretrial order, there was no objection regarding any of the stipulated facts.

On March 12, 2007, the jury trial commenced. After the Court provided the parties the final pretrial order which had all of the stipulated facts except one,

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[18] In her deposition, plaintiff stated that Farag provided her with additional lyrics prior to recording the demo for LCCVB. (R 71, Exhibit 8, pp. 42, 141.)

plaintiff's counsel objected arguing that they did not have enough time to review the stipulated facts even though plaintiff's counsel sent an e-mail communication agreeing to the stipulated facts on February 7, 2007. (R 345, pp. 11-16, A 345-350.) The Court, giving plaintiff counsel the "benefit of the doubt," struck 10 stipulated facts." (*Id.*)

The case was tried from March 12, 2007, through March 16, 2007. During the trial, extensive testimony was obtained from Janky and Farag demonstrating there were significant lyrical and melodic changes to "Wonders of Indiana" as reflected in the December 1999 copyright registration for the revised song. (R 349, pp. 64-78, A 367-371; R 350, pp. 11-18, A 453-470.)

Mr. Farag testified about his contributions to the creation of the song at issue:

> Q. And did anyone, including Cheryl Janky, ever ask from you for there to be a writing memorializing this agreement that you negotiated on behalf of Stormy Weather with the bureau?
>
> A. No.
>
> * * *
>
> A. Yes. I told the group and Cheryl specifically the lyrics had to be specific as to Lake County and different phrases had to be changed and --

Q. Approximately how many meetings, if you recall, or rehearsals would there have been to go over the changes either as a group or changes you were making yourself before you ever ended up at Thunderclap studios to record this?

A. I believe maybe two.

Q. Outside of Thunderclap?

A. Outside of Thunderclap. And I'm really not even sure. It could have been one or two, because I was even rewriting lyrics at the studio.

* * *

BY MR. JORDAN:

Q. Mr. Farag, I would ask that you take a look at these and scan them, and then I'll be putting them on the prompter that will show on your monitor here (indicating) so that we can go over them together.

A. Yes, I see them.

Q. You recognize those?

A. Yes.

* * *

Q. Mr. Farag, is that large enough for you to be able to read from there?

A. Yes.

Q. All right. Representing to the Court that on the left where it says, "Wonders of Indiana," that is Exhibit AA. And on the left, we have Exhibit BB, the lyrics that correspond to December, and subsequently, July copyright registration.

Looking at these lyrics, either word by word or line by line, do you see difference, sir?

A. Yes.

Q. How would you characterize the difference? Are they de minimis, are they significant?

A. Significant lyrical changes.

Q. Looking at it, could you describe or pick out a line or two or however many to show for us what you refer to as "significant changes?"

A. Well, the first one was Lake County, Indiana, which would be the way it's sung, the hook, "Lake County, Indiana," (witness singing) that's what most people would remember of this whole song.

Then things like "Chicago's neighboring South Shore family fun, ethnic diversity, Hoosier hospitality, hotels, industry, universities." It is completely rewritten.

* * *

Q. Because the prompter does not allow it, and everyone else has seen it, but I want you to have the alternate bridges, as well, to compare to see if you still believe that the number of changes that exist for the Exhibit BB, the December, July copyrighted version of the song used by Lake County, if you still believe it's significantly different – looking at not only the original lyrics but he possibility of substitution alternate bridges, do you still believe the finished product form December, July is significant?

* * *

A. Yes. I would consider the adapted version a world of difference.

Q. In addition to lyrical changes, were there any other changes to the melody, or harmony, tempo, anything like that?

A. Well, I know that – and I recall this in the studio. The tourism bureau wanted ethnic diversity as one of the tag lines, and it's a very hard thing to sing. So you have to – a lot of syllables. So we had to change it to – a little bit. It was a hard one to sign. It's trying to see which – "hotels and restaurants, put smiles on your faces." You have to run through a lot of that and you have to – just to make sure that we got the corrected tag lines in there and get all the syllables in, some of the melody had to change, too.

Q. Was any of the tempo or harmony, anything else changed?

A. Well, the minute you change one, you have to change another. It's almost like math. The minute you talk about "diversity," for instance, now, it's not just one word. It's three(sic) syllables. Now you have to rhyme that. So now you've got more syllables to deal with, plus a rhyme to go with that, and so it's never just one thing.

* * *

Q. With that understanding, do you still maintain the position that the version used by Lake County is significantly different than that which you were initially presented by Cheryl Janky?

A. Yes."

(A 459-467.)

Despite this testimony, the Court refused to give a requested jury instruction on co-authorship and the rights of co-authors to license a song without the consent of the other co-author in light of its ruling on infringement. (R 352, pp. 8-15, A 437-444.)

The jury returned a verdict of $100,000.00 from which sanctions against plaintiff were setoff. (R 240.)

On March 29, 2007, LCCVB filed a motion for remittitur or in the alternative new trial on damages. (R 248.) The motion was based on plaintiff admitting

at trial that she knew by December 1, 1999, that LCCVB was using the song without her authorization, but did nothing to notify Lake County until 2003. (R 247, p. 2.)

At trial, plaintiff testified that the licensing fee for an original song would be approximately $30,000.00. Hence, the jury verdict of $100,000.00 represents a licensing fee of $30,000.00 per year for the years 1999 through 2001 and, as the plaintiff requested in closing argument, interest. (R 247, pp. 2-3.)

On May 16, 2007, the Court denied LCCVB's motion for remittitur. (R 267.)

LCCVB appealed the jury verdict and plaintiff Janky only cross-appealed the imposition of Rule 11 sanctions against her counsel Gregory Reed.

After full briefing and oral argument, the Court of Appeals issued its opinion on August 3, 2009, reversing the jury verdict and directing that an order of summary judgment be entered in favor of LCCVB as the song at issue was the work of joint authorship. Therefore, Farag had the right to license the song to the LCCVB. Addressing the cross-appeal, the 7th Circuit affirmed the imposition of the sanctions and that the sanctions were payable by Mr. Reed directly to the LCCVB – which have yet to be paid.

REASONS FOR DENYING THE PETITION

PETITIONER HAS PRESENTED NO COMPELLING REASONS AS IDENTIFIED BY SUP. CT. R. 10(A) TO GRANT THE PETITION, WHERE THE ISSUES AS FRAMED BY PETITIONER WERE NEVER PRESENTED IN THE DISTRICT OR APPELLATE COURTS AND ARE BASED ON A MISREPRESENTATION OF THE RECORD BY PLAINTIFF WHERE PLAINTIFF AND HER COUNSEL HAD PREVIOUSLY ACKNOWLEDGED THAT THE SONG AT ISSUE WAS JOINTLY AUTHORED BY PLAINTIFF AND FARAG RESULTING IN FARAG HAVING THE AUTHORITY TO LICENSE THE SONG TO RESPONDENT LCCVB THEREBY NECESSITATING ENTRY OF SUMMARY JUDGMENT IN THE DISTRICT COURT CONSISTENT WITH THE LAW PERTAINING TO JOINT AUTHORSHIP OF A SONG.

A. Petitioner fails to present any conflict in the decision of the Court of Appeals and has not met her burden of demonstrating compelling reasons for the petition to be granted where plaintiff ignores or otherwise misrepresents the record, electing to continue to engage in false and sanctionable accusations of Respondent's counsel.

Although somewhat obdurate, it appears that petitioner's argument for the petition to be granted

consists of the following contentions: (1) the 7th Circuit decision is contrary to other 7th Circuit decisions and the law of the majority of circuits, presumably in regard to what constitutes joint authorship; and, (2) the actual joint author of the work is the CEO of Respondent rather than Farag, despite what petitioner states in her copyright application regarding the song. As will be seen, petitioner has failed to show any compelling reasons for review of her petition. But first, it is necessary to address the bellicose and false accusations contained in plaintiff's document.

Plaintiff asserts, despite being sanctioned in a related case for the identical accusation, that LCCVB "materially misrepresented the truth by falsely asserting false claims as 'work for hire and joint authors' in Court and its pleadings." (Petition, p. 7.) This argument was the subject of plaintiff's claims for attorneys' fees in the District Court matter in this case, which were denied, prompting plaintiff to file a second Federal action attempting to obtain an attorney fee award by making the same accusations. In *Janky v. Speros Batistatos, et al,* USDC – Northern District of Indiana Case No. 2:07-cv-339, (referred to as "Janky 2") Janky filed a complaint against the respondent, its Board of Directors, its CEO, and its attorneys. As articulated by Judge Simon in that matter:

> The complaint was based on claims those defendants asserted when defending an earlier Federal copyright lawsuit also brought by Janky. The main thrust of this second lawsuit was that the defenses used in the first case [the instant matter] were frivolous and groundless. In fact, there was no basis for Janky's second lawsuit, as it had been established in the initial

> litigation that the defenses were grounded in fact and credible evidence, and were held by the judge in that case to not be frivolous. After dismissing the complaint before me, I sua sponte order respondents to show cause why they should be sanctioned for violating Rule 11(b). . . . Because they failed to show that the claims included in the second lawsuit were warranted by existing law or by non-frivolous argument, or that the suit was brought for a proper purpose, sanctions will be imposed.

(See Janky 2, Doc. No. 53, Memorandum Opinion and Order, pp. 1-2.)

Next plaintiff makes the incomprehensible assertion that "All filings by respondent were to mislead the Court with material misstatements that were false and fraudulently asserted," citing to appendix pages which are the opinions of the 7th Circuit and the District Court. Strangely, this reference to the District Court opinion was the same opinion that had granted Janky summary judgment. Not content with that unfounded statement, petitioner feels it necessary to make the following statement that demonstrates that she has chosen to completely ignore the factual record: "There is no evidence before the lower court or the 7th Circuit panel that Farag intended to be a joint owner/author." (See Petition, p. 15.) In order to make this statement, plaintiff has chosen to ignore her own declaration, Farag's declaration, her attorney's correspondence identifying her as a co-writer, her own copyright registration and the trial court's opinion ruling this was a question of fact for the jury. Or, as articulated by the 7th Circuit: "Janky's post-hoc rationalization – that she only

intended to express her gratitude (by identifying Farag as a co-owner and co-author in the copyright registration) is simply at odds with the significant contributions made by Farag and Janky's identification of Farag as a co-author." (See 7th Circuit Opinion, p. 11, Petitioner's Appendix, p. 11-a.)

Petitioner claims that "Respondent's hands are not clean [without any factual support or the ability to divine the meaning of this statement] and that the Court of Appeals' holding [was in error] when there was not any privity with the author Janky and respondent lacked standing in asserting co-authorship for Farag who filed bankruptcy disavowing interest in the song [with cites to the appendix]." However, the cites in the appendix have nothing to do with Farag "disavowing interest" in the song in the bankruptcy proceeding. Nor is it clear what petitioner means that respondent lacks "standing"in asserting co-authorship with Farag where Farag was the one identified as a co-author by Janky herself, and Farag licensed the song to LCCVB for its use.

Turning now to plaintiff's legal argument, it appears that plaintiff is contending that under the copyright statute, 17 U.S.C. § 101 and § 201, and the decision of *Erickson v. Trinity Theater*, 13 F.3d 1061 (1994), that Farag is not a co-author, but rather that Batistatos is the co-author of the song.[19] Plaintiff's arguments are without merit.

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[19] This begs the question that if Batistatos is the actual co-author of the song, then was he not in a position to authorize the use of the song by the LCCVB?

Petitioner maintains that "*Erickson* is the standard" (presumably in regard to the appropriate test for determining whether a work has been prepared as a joint work within the meaning of U.S.C. 17 § 101), but plaintiff provides no analysis of the *Erickson* decision in regard to how the decision in this case conflicts with *Erickson*.

17 U.S.C. § 101, the definitional section of the copyright act, defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into **inseparable or interdependent** parts of a unitary whole." [Emphasis added.] Authors who create a joint work are co-owners of the copyright in that work. 17 U.S.C. § 201(a). Each author has "an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits." See *Erickson, supra,* p. 1065, fn 2.

The 7th Circuit in *Erickson* was confronted with the issue for the first time as to the standard for determining whether a work has been prepared as a joint work within the definitional section of the copyright act. There, the defendant maintained that the standard for determining a joint work was collaboration alone because there was collaboration between the plaintiff author and the actors of the defendant theater company. On the other hand, the plaintiff contended that none of the plays were joint works because she was the only author and the other actors had not contributed independent copyrightable material.

The magistrate judge recommended that a preliminary injunction be entered in favor of Erickson

concerning the plays. The magistrate judge followed primarily the second circuit's test in *Childress v. Taylor,* 945 F.2d 500, 505-506 (2nd Cir. 1991), which found two elements necessary to arrive at joint ownership: (1) The contribution of each joint author must be copyrightable and (2) the parties must have intended to be joint authors. *Erickson, supra,* at pp. 1065-1066.

Both parties filed objections to the magistrate judge's recommendation. The District Court then analyzed the question of joint authorship and examined the two competing tests, namely the *Childress* standard (1) requiring both copyrightability and intent to be joint authors; and, (2) the "collaboration test" with the major difference between the approaches being that the latter does not require each of the claimed joint author's contributions to be independently copyrightable. *Id.,* p. 1067.

The District Court did not choose between the two alternatives, instead finding that under either standard, the plaintiff was likely to prevail on the merits. As to the collaboration test, if it were the correct standard, the District Court concluded that there would need to be a "de minimus collaboration." Accordingly, the District Court found that because the actors' contributions were less than de minimus, the defendant could not prevail.

On review to the Court of Appeals, the Court noted that under the copyright statute, 17 U.S.C. § 201, joint authors hold undivided interest in a work despite any differences in each authors' contribution such that each author as co-owner has the right to use or to license the use of the work subject to an accounting to

the other co-owners for any profits. *Id.*, at p. 1068, citing the *Childress* decision, supra. Further, as observed by the 7th Circuit, "[t]hus, even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys a significant benefit." *Id.*, at p. 1068. The 7th Circuit also cited to 17 U.S.C. § 101 defining a joint work as a work prepared by two or more authors *"with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."* [Italics added.] The 7th Circuit emphasized this point by citing to *Childress* stating that: "We believe that the statutory language clearly requires that each author intended their respective contributions be merged into a unitary whole." *Erickson*, at p. 1068-1069.

Turning to the test to evaluate the contributions of authors claiming joint authorship status, the *Erickson* Court acknowledged the de minimus test of Professor Nimmer and the copyrightability subject matter test of Professor Goldstein. In analyzing the two tests, the *Erickson* Court stated: "The de minimus test requires that only the combined product of joint efforts be copyrightable. By contrast, Professor Goldstein's copyrightability test requires that each authors contribution be copyrightable." *Erickson*, at p. 1069. As further analyzed by the Court, the major difference between the two tests is to preclude the ability to copyright ideas. *Erickson*, at p. 1071. Given this requirement, Professor Nimmer's de minimus test, according to the Appeals Court, is an inadequate judicial tool to ascertain joint authorship. *Id.*, at p. 1070.

The *Erickson* Court gave an example of why the de minimus test was impractical using the example

provided by Professor Nimmer himself who asserted that if the two authors collaborate, with one contributing only *uncopyrightable plot ideas* and another incorporating those *ideas* into a completed literary composition, the two authors should be regarded as joint authors of the resulting work. *Id.*, at 1070. In contrast, Professor Goldstein's copyrightability requirement is consistent with the language of the Copyright Act itself. As noted by *Erickson*, the copyrightability test has been adopted by the majority of the courts that have considered the issue. *Id.*, at 1070. Under this test, "To qualify as an author, one must supply more than mere direction or ideas, an author is 'the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.'" See *Erickson*, at p. 1071.

In reaching its holding, the 7th Circuit stated: "The copyrightable subject matter test does not suffer from the same infirmities as Professor Nimmer's de minimus test. The copyrightability test advances creativity in science and art by allowing for the unhindered exchange of ideas and protects authorship rights in a consistent and predictable manner. *It excludes contributions such as ideas which are not protected under the Copyright Act.* 17 U.S.C. § 102(b)." [Italics added.] *Erickson*, at p. 1071. Therefore, under the majority copyrightability test as adopted by the 7th Circuit, there are two elements:

1. The parties must have intended to be joint authors at the time the work was created; and,

2. The party claiming joint authorship must show that its contributions to the work was "independently copyrightable."

In applying the standard to the facts in *Erickson*, the 7th Circuit found that as to two of the works, Much Ado and Prairie Voices, the Defendant could not show that the parties intended to be joint authors. First, it was conceded by the Defendant that it was Ms. Erickson's decision alone regarding what, if any, contributions the defendant were to be included in the play. Second, the actors, as represented by the Defendant, did not consider themselves to be joint authors with Ms. Erickson.

The contrary exists in this case. Most significantly, Janky herself identified Farag as a co-author in the copyright registration and as an owner of exclusive rights in the song. Even Janky's counsel identified her as a "co-writer" in his first letter to the LCCVB in regard so the song at issue. Janky's affidavit, (which was termed by the 7th Circuit as a "post-hoc rationalization" as to why she identified Farag as a co-author), demonstrates that at the time of the copyright registration, the inclusion of Farag as a co-author and owner of exclusive rights in the song established the intent element of the copyrightability test. Indeed, the *Erickson* Court observed that in the Second Circuit decision of *Childress*, the Court acknowledged that "billing or credit" may be evidence of intent to create a joint work.

Turning to the second element of the test for joint authorship, the Court in *Erickson* found that this test could not be meant for any of the works in question because, "The actors, on the whole, could not identify

specific contributions that they had made to Ms. Erickson's works. . . . Ideas, refinements, and suggestions, standing alone are not the subject of copyrights." *Erickson,* at 1072-1073.

Conversely, in this matter, Farag's contributions "went beyond general 'ideas, refinements, and suggestions.'" See 7th Circuit Opinion, Plaintiff's Appendix p. 11a. As the testimony at trial revealed, the changes, even if they amounted to only 10% of the lyrics were significant, "They were important not only to the final sound, but also to its commercial viability." *Id.* Or, in other words, "even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys a significant benefit." *Erickson,* p. 1068.

In sum, the Court of appeals decision in this matter is consistent with the *Erickson* decision and the majority of circuits that have adopted the copyrightability test as articulated by *Erickson.* The petitioner, therefore, has not met her burden pursuant to Sup. Ct. R. 10 demonstrating any "compelling reasons" for the petition to be granted by this Court.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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DATED: January 29, 2010

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(3)

No. 09-793

FEB 11 2010

In The
Supreme Court of the United States

CHERYL JANKY,

Petitioner,

v.

LAKE COUNTY CONVENTION AND VISITORS BUREAU,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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SUMMARY

The Petitioner prevailed in the lower court as being the copyright owner. The Respondent secured a reversal based on material misrepresentations of the law and facts. The Respondent's Brief in Opposition (Opposition) illustrates additional support for Petitioner's Writ of Certiorari for review of the issue of joint authorship as provided by *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994). Particularly, when Farag represented several times at his deposition and at trial that he and Respondent are partners and have a 20 year friendship. [App. II, pp. 4a, 5a, 6a, 11a] Farag did not express any "intent" to be a joint author nor did he provide any independent copyrightable parts to be merged with Petitioner's song. [App. pp. 5a and 57a] Respondent merely translated ideas to Farag, who was the **"hired"** runner [App. II, pp. 3a, 5a, 11a] to get Janky's song for Respondent from Petitioner, copyright owner unbeknownst to Janky, the owner.

The Respondent LCCVB paid the hired Farag **$15,000** for his services to secure Janky's music composition [App. II, p. 1a, 2a, 3a, 5a] plus promotional marketing support of $20,000 plus to benefit Farag and Respondent to secure Janky's music and lyrics. Farag's **"hired"** and employed [App. II, pp. 5a, 11a] by Respondent did not constitute a joint authorship with the Petitioner. The Court of Appeals reversed the District Court's decision and erred, creating conflict among the majority court circuits. The Respondent and Farag's first scheme was to induce Petitioner to create for Respondent the tourism song under the guise of entering into a songwriting contest. The Respondent and Farag carried out a plan to launch Petitioner's copyrighted "Wonders of

Indiana" song once delivered to Respondent without her authorization, to place the music on phone lines, sell records, market her song in movie theaters to benefit Respondent and Farag. [App. p. 64a] Petitioner was defrauded out of her copyright plus money based on the pretext that Petitioner was entering a song contest to lawfully help Respondent. Petitioner filed a suit against the infringers, Respondent and Farag, who was **hired** by Respondent [App. II, p. 11a] and the alleged joint author. Then Farag filed a counter lawsuit against Petitioner for $1,000,000, alleging that the copyright registration with his name on it was a forgery, disavowing any interest in the song. The Court of Appeals, however, overlooked the record, void of Farag's intent. [App. pp. 15a, 41a, 42a and 59a]

The Opposition failed to cite one case to support the Court of Appeals' conflicting decision with the majority circuits. In their 37 page Opposition Brief, Farag failed to establish intent and joint authorship.

The Opposition seeks to cloud the facts. The District Court Judge Cherry and the Court of Appeals' dissenting Judge Ripple easily discerned that there was ***"no intent"*** to create a joint authorship between Farag and the Petitioner, Cheryl Janky. [App. pp. 15a, 58a, 59a, 61a and 63a] ***Moreover, the record is void of any intent [App. p. 63a] and the few ideas offered by Batistatos were not copyrightable as noted by the District Court and the Court of Appeals' dissent by Hon. Ripple and under any of the cases cited by Respondent, notably Erickson v. Trinity, 13 F.3d 1061 (7th Cir. 1994)*** [App. II, pp. 3a, 5a, 8a, 9a] Petitioner's Writ for Certiorari is necessitated by the circumstances that the request impacts the creativity of Americans globally.

Petitioner's writ for review will protect all creative persons' and institutions' copyright interests internationally and globally beyond Respondent's self-serving interest. A travesty occurs when a third party such as Respondent advocates for its own benefit to use Petitioner's song based on underhanded methods in **hiring** the band leader Farag as a conduit/liaison of ideas [App. II, pp. 11a, Pet. Writ 13-14] to be the joint author owner when there is no contribution from the liaison party. The Court of Appeals' reversal decision here for Respondent can destroy commerce and eviscerate the current case laws, circuits and statutes. In absence of intent, argued by Respondent, a person who collaborates knowingly or unknowingly could use the internet system that conveys ideas, transmit suggestions ***as a provider source such as aol.com or yahoo.com can become a joint author of a party's work when one advocates such erroneous factual and legal grounds as Respondent that intent or copyrightable parts are not significant elements***. Respondent's posture is meritless to characterize Farag as the joint author without any contribution on the record except he was a go between for the Respondent to talk to the Petitioner. [App. pp. 47a, 51a, 54a-63a, App. II, pp. 8a, 9a, 11a, Pet. Writ, p. 8] The Petitioner's compelling case for Writ of Certiorari has overwhelming, positive and overreaching impact that affects a global concern to protect creative persons lawful rights than to leave them in a conflicting posture.

Petitioner submits that this case warrants review to confirm with clarity that ***"mutual intent is a requisite for copyrightable parts" that are to be merged together is the law of the majority circuits per Erickson to establish joint***

authorship and under the Copyright Act, 17 U.S.C. §101, §201, §202 and §204.

Respondent's counsel continued to misrepresent material facts and law before this court as to who revised the song [Pet. Writ, pp. 13-14][1] by concealing statements of Respondent's executive, Mr. Batistatos, stated unequivocally, "I alone suggested the few changes..." and gave them to Mr. Farag to offer to Ms. Janky for her consideration. [Pet. Writ, pp. 13-14, App. II, pp. 3a, 5a, 8a, 9a] Mr. Farag confirmed this statement and demonstrated that he did not intend to be a joint author and filed a lawsuit against Petitioner's registered copyright application. [App. pp. 15a, 41a, Pet. Writ, pp. 13-14] The Court of Appeals' split decision awarded Farag joint authorship based on material misstatements of law and falsehoods [App. pp. 1a-14a]

Petitioner Janky inadvertently inserted Farag's name on a copyright and corrected this incident. [App. p. 59a] Petitioner's motive was to give credit to Farag for his suggestions. [App. p. 59a] The District Court Judge Cherry took judicial notice of Petitioner's correction and saw there was no mutual intent under the majority circuits and *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994). [App. pp. 40a-72a] Also, there was no copyrightable parts, *Erickson,* Supra. The jury confirmed this and the Court of Appeals' dissent cited this error in the Appeals' decision. [App. p. 1a] Respondent's Brief in Opposition and mischaracterization of stating the facts and law

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[1] Petitioner's Writ of Certiorari by Cheryl Janky filed in this matter.

provides greater weight for compelling grounds for Petitioner's writ to be granted.

The Petitioner raised and framed Respondent's material misrepresentation of issues and law before the District Court and the Court of Appeals in Petitioner's brief. The Court of Appeals' three (3) member panel had two (2) of the judges to rely on the Respondent's material misstatement of facts that Farag *provided the intent to be the joint author for the* "song's suggested changes." The Appeal Court's two (2) members out of three (3) set aside the Janky decision. Petitioner's Writ, pages 13 and 14, supported by the court record below presented an accurate and truthful statement that intent is lacking.

The questions in establishing an intent are simple and the indisputable record shows the following:

(1) Did two (2) persons [Janky and Farag] agree to create a body of works? ***No.*** *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994) [App. pp. 49a-63a, App. II, pp. 1a, 3a, 5a, 11a]

(2) Did the two persons [Janky and Farag] intend to form a joint authorship? ***No.*** *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994) [App. p. 63a, App. II, p. 11a]

(3) Did Respondent's executive, Speros Batistatos, solicit the Petitioner to create a body of work for the Lake County Convention and Visitors Bureau by using Farag? ***Yes.*** [App. p. 47a, App. II, p. 11a]

(4) Who solely offered ides for changes to Petitioner's song? ***Speros Batistatos***. [Pet. Writ, pp. 13-14, App. II, pp. 1a, 3a, 5a, 11a]

(5) Did Farag state he made any changes to Petitioner's work? ***No.*** *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994) [Pet. Writ, p. 14, App. p. 15a, App. II, pp. 8a, 9a, 11a]

(6) Was there any mutual intent to create a joint "Wonders of Indiana" song between Respondent and Petitioner or the translator, Farag, of the ideas? ***No.*** [App. p. 63a, App. II, pp. 3a, 5a, 11a]

(7) Who was the hired runner between the songwriter Janky and the Respondent's executive, Batistatos' song ideas to present to Janky? (a) ***Farag was the runner for Batistatos and Farag contributed zero (0) changes to the song.*** [Pet. Writ, p. 14]; (b) ***Batistatos offered his ideas and recommendations to the runner***. [App. II, p. 11a]

(8) Does a few words or ideas offered by Respondent constitute parts to be copyrightable parts? ***No.*** *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994) [App. p. 63a] and the Copyright Act.

(9) Who filed a counterclaim against Petitioner disavowing any interest in Petitioner's copyrighted application? ***Farag.*** His acts are contrary to *Erickson v. Trinity*, supra, intent. [App. p. 15a]

(10) Who filed bankruptcy and did not list any interest in the Petitioner's copyrighted song at issue that was consistent with his testimony and Respondent's executive Batistatos that he did not contribute to the joint creation of the song? ***Henry Farag hired by Batistatos***. [App. II, p. 11a]

The District Court and the dissenting judge at the Court of Appeals found the court record void of any mutual intent. [App. p. 63a]

ARGUMENT

1. Respondent Compounded More Material Misrepresentation of Facts and Petitioner's Issues Were Raised in the District Court and the Court of Appeals Which Demonstrates the Need for Review.

Respondent's first material misstatement is in the Opposition Brief, on page 1, which states, "ultimately, Janky and Farag revised a work of Janky's entitled "Wonders of Indiana" to conform with LCCVB's requirements." Janky revised her own work in consideration of Farag's suggestion secured from Speros Batistatos. [Pet. Writ pp. 13-14, App. II, pp. 8a, 9a] ***The false premises advocated by Respondent demonstrated a repeated pattern in providing material misrepresentation of facts and law to the court and now the Supreme Court of the United States. Respondent's counsel has caused the conflicted split decision with the Court of Appeals in advocating the untruth.***

Respondent made another major material misstatement and mischaracterization on page 7 in its Opposition Brief. Farag "participated in the significant revisions of the song that was ultimately accepted by LCCVB, Respondent." Who made the revisions or suggestions? Batistatos made the changes and offered several ideas. [Pet. Writ, pp. 13, 14] Janky wrote the song under the pretext of a contest sham postured by **Respondent's**

partner, [App. p. 47a] Farag. Janky incorporated Batistatos' ideas, thinking they were Farag's. Batistatos stated he acted alone [Pet. Writ, pp. 13, 14, App. II, pp. 8a, 9a] and made the suggested idea word changes. This statement articulated by Batistatos showed there was never any mutual intent between Petitioner and Farag to create a joint authorship. *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994)

Farag testified and confirmed Respondent's CEO's changes. [App. pp. 1, 15, 16, App. II, pp. 8a, 9a] Based on Respondent's and Farag's concealed acts, the District Court, Janky and Petitioner's counsel were deceived to think that Farag offered the minored ideas for Petitioner's song until Farag and Batistatos presented their testimony in "trial" that Farag did not make one change and Batistatos offered the ideas for change. [App. II, pp. 3a, 5a, 8a, 9a] Then Petitioner recognized that Respondent's counsel had filed fraudulent pleadings throughout the court process [Pet. Writ, pp. 13, 14] The few words offered to revise Petitioner's song were provided by Batistatos. The truth came out when Farag and Batistatos' parties confirmed their role. [App. II, pp. 3a, 5a, 8a, 9a] Farag's make believe contest [App. p. 47a] was a theft and shell game scenario set up to take Cheryl Janky's song by unlawful means. Farag collaborated or conspired with Respondent's executive to perpetrate a contest scheme and did not write any words for Janky's song. The Court of Appeals erred in its ruling and the decision did not conform with the majority circuits and statutes, *Erickson v. Trinity,* 13 F.3d 1061 (7th Cir. 1994), *Childress v. Taylor,* 945 F.3d 644 (7 Cir. 2004), 17 U.S.C. §101, §201, §204.

Another material misstatement in the Opposition Brief indicated that Farag's contribution to Janky's song is 10% and was significant. Farag's contribution to Petitioner's song is zero (0). It cannot be argued that Farag's contribution is greater than 10% that benefit Respondent only. Farag's contribution to the copyrighted song that Batistatos stated is zero (0). Batistatos alone revised the song. Notably, Farag and Petitioner all agree with Batistatos on this point that Farag contributed nothing in writing to Petitioner's song. The Court of Appeals overlooked several key admissions of Respondent's executive admissions and Farag's. [Petitioner's Writ, pp. 13, 14, App. II, pp. 8a, 9a]

CONCLUSION

Compelling errors in law and evidence exist in the court's record to grant Petitioner's Writ of Certiorari to provide uniformity within the circuits to protect the creative process among all copyright owners. The creative process will be hampered based on the Court of Appeals' decision whenever there is more than one person involved in the creative process. The Petitioner for Writ of Certiorari humbly requests review by this court to maintain uniformity among the circuits.

Respectfully submitted,

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APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HON. PAUL D. BORMAN
CASE NO. 03-74021

[Dated June 22, 2004]

CHERYL JANKY,	)
	)
Plaintiff,	)
	)
vs	)
	)
HENRY FARAG, STREET GOLD RECORDS and LAKE COUNTY CONVENTION and VISITORS BUREAU,	)
	)
Defendants.	)

The deposition of HENRY FARAG, having been called as a witness by the Plaintiff, pursuant to Notice of Deposition, at the conference room of the Lake County Convention and Visitors Bureau, 7770 Corinne Drive, Hammond, Indiana, on Tuesday, June 22, 2004, and commencing at the hour of 12:00 p.m.

This deposition was reported by NANCY L. CEGLAREK, a duly authorized shorthand reporter and duly commissioned officer of the State of Indiana.

* * *

[p.8]

up with the song about Lake County?

A. I told him I needed certain code words or specific phrases that he wanted incorporated into the song.

Q. Did you also tell him that you needed **$20,000.00?**

A. Well, after that. [Emphasis added]

Q. Okay. Then let's back up a little.

So other than the code words that you needed in order to develop this song for the bureau, what else did you tell him you needed?

A. In terms of . . .

Q. In terms of being able to actually produce the results that he wanted.

A. Well, originally I told him that he would have to pay for the studio time to do a demo.

Q. Do you recall how much you told him you needed?

A. I don't know if it was -- it seems to me it was about $500.00.

Q. And you were able to come up with a demo?

A. Yes.

Q. And did he like the demo?

A. He liked it but suggested lyrical changes that more directly reflect Lake County, Indiana.

* * *

[p.9]

* * *

Q. Okay. So did he suggest what code words or what additional lyrics should be included?

A. Yes.

Q. And did you incorporate his suggestions into the song?

A. Yes. [Emphasis added]

Q. Now, were you aware, Mr. Farag, at the time that all of this negotiations, conversations, whatever was occurring between you and Spiros Bodastatos what he wanted to do with the song?

A. Yes.

Q. And what did he want to do with the song?

A. Use it as part of a program to enhance or help create a positive image of Lake County, Indiana.

* * *

[p.12]

* * *

Mr. Farag, we were talking about things that occurred in the development of a relationship between you and Spiros Bodastatos and the bureau, do you recall?

A. Yes.

Q. Would you consider him a **partner?**

A. Yes.

Q. And did you memorialize the terms of the **partnership** with some type of agreement that was executed by both sides? Was there a signed contract in other words? [Emphasis added]

A. No.

Q. Did you appear before the board and get an agreement approved?

A. No.

Q. Were you told by Mr. Bodastatos that the agreement had been approved by the board?

A. I know that there were discussions. I don't know or can't recall what the actual discussions were about.

* * *

[p.13]

* * *

Q. As a matter of fact, did you do an interview with the newspaper called the Region in regards to the partnership between you and the bureau?

A. I may have, I don't recall.

Q. Say back in July maybe of 2000?

A. Refresh my memory.

Q. Did you -- do you recall telling the newspaper, the *Region*, back in July of 2000 that the tourism board okayed your *Doo-wop* album about Lake County?

A. I probably did.

Q. Do you recall telling them that you were **paid $15,000.00** for -- to sell 1,000 CDs and 500 audio cassettes of the up coming album, *Doo-It-Doo-Wop* by the artist Stormy Weather to the bureau? [Emphasis added]

A. Well, that was the case.

Q. Okay. And that album included the song "Lake County, Indiana"?

A. Yes.

* * *

[p.18]

* * *

Q. Now you've indicated that you were in **partnership** with the bureau. What was the bureau supposed to receive in terms of consideration for its involvement with you as a partner? [Emphasis added]

A. Promotion of the song, "Lake County, Indiana."

Q. That was supposed to benefit them? Promoting your song, "Lake County, Indiana" was supposed to benefit the bureau?

A. The song was called, "Lake County, Indiana."

Q. Why was it called "Lake County, Indiana"?

A. That's what the tourism bureau wanted.

* * *

APPENDIX 2

EXCERPT TRANSCRIPT OF A TRIAL

IN THE MATTER OF:

HENRY FARAG

March 14, 2007

CAUSE NO.
3:05-CV-217-PRC

BOSS REPORTERS
(219) 769-9090
2115 W. 81st Avenue
Merrillville, Indiana 46410
BOSSREPORTERS@SBCGLOBAL.NET

* * *

[p.15]

he was insistent that certain phrases and names of the Lake County area be in this song. So I started putting some of those phrases down and. Up till that point that's what I did. [Emphasis added]

Q. So would it be fair to say that Mr. Batistatos made some requests for things that should be included in the song and you took down notes on what he wanted to be mentioned in the song. And that was the extent of what you had done up to that point?

A. Yes.

Q. Did you make any contributions to the song that was on the cassette that Ms. Janky brought into the meeting?

A. **No.** [Emphasis added]

* * *

A. I listened to it. I thought it was a decent song. I said I would take it to Speros, see what he thought. And that's what happened.

Q. So essentially the cassette of the song that Ms. Janky

[p.16]

brought to the meeting was taken to Mr. Batistatos for his consideration?

A. Either the tape itself or my memory of the song. But I believe it was both, the tape and my own memory of the song.

Q. How long after Ms. Janky brought the tape in to the meeting did you have a follow-up meeting so that Mr. Batistatos could listen to Ms. Janky's song?

A. It was probably a few days.

Q. So would it be safe to say it was within the same week that Ms. Janky provided it to you?

A. I believe so.

Q. You go to the meeting, correct, you go back to Mr. Batistatos's office?

A. Yes.

* * *

Q. What was Mr. Batistatos response, to the best of your recollection?

A. ***He thought it was a good song, too. But he was very insistent about certain phrases and words. And he even added some more at the meeting than he had before. That those be in it because the song that I presented him that Cheryl had written was essentially a song about the state Indiana and not Lake County, Indiana. And those things*** [Emphasis added]

* * *

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION

Cause No. 3:05-CV-217-PRC

[Dated March 12, 2007]

CHERYL JANKY,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LAKE COUNTY CONVENTION & VISITORS BUREAU,	)
	)
Defendant.	)
	)

EXCERPT TRANSCRIPT OF THE TESTIMONY OF SPEROS ANGELOS BATISTATOS
TRANSCRIPT OF A TRIAL
BEFORE THE HONORABLE PAUL CHERRY, UNITED STATES DISTRICT MAGISTRATE JUDGE, and a Jury, held on the 12th day of March, 2007.

* * *

[p.5]

* * *

Q. You're attended that Mr. Farag might be a friend of yours?

A. No, I'm not referring to that.

Q. Oh, I'm -- well, he's a friend of yours; is that right?

A. I would characterize Henry as someone I've known for the better part of 20 years, he's never had dinner in my home I've never loaned him my car, so how you define friend is up to you, ***I hired*** Henry for professional services with respect to this song. [Emphasis added]

* * *

[p.8]

* * *

Q. Did Mr. Farag give you a license in writing?

A. Mr. Farag and I had a very clear understanding of what our business relationship was. And it was one that he was producing ***a work for hire***, he was to handle all of the hand us a finished product, he handed us a finished product, being someone that I've known for 20 years I understood our relationship. [Emphasis added]

Q. So you weren't supposed to pay for it?

A. We did pay for it.

* * *